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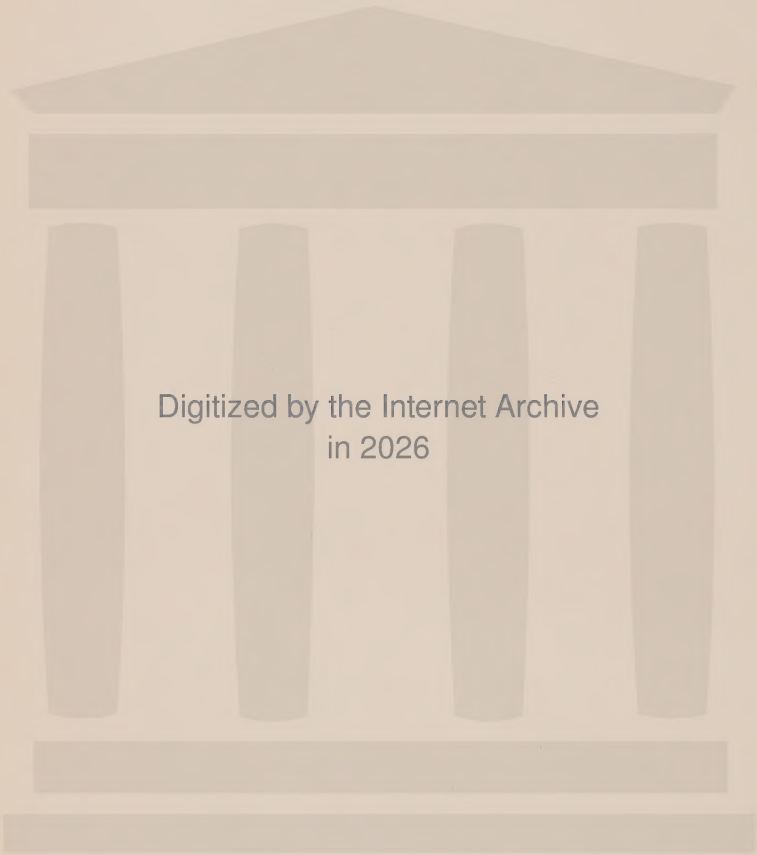
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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION

LIII. VICTORIÆ.

[IN THE COURT OF APPEAL.]

1889
Nov. 2, 7.

HORNSEY LOCAL BOARD *v.* MONARCH INVESTMENT BUILDING SOCIETY.

Local Government Acts—Paving Expenses—Charge upon Premises—Limitation of Actions—Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *s.* 69—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *ss.* 62, 63—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 257—*Real Property Limitation Act* (37 & 38 *Vict. c.* 57), *s.* 8—"*Present right to receive.*"

Where a local authority had under s. 69 of the Public Health Act, 1848, incurred paving expenses, which by s. 62 of the Local Government Act, 1858 (corresponding to s. 257 of the Public Health Act, 1875), were made a charge upon the premises in respect of which the same were incurred:—

Held (affirming the judgment of the Queen's Bench Division), that such expenses became a charge on the premises upon the completion of the works, and that the period of limitation in respect of such charge under the Real Property Limitation Act, 1874, s. 8, began to run from that date, not from the date of the apportionment of such expenses among the frontagers.

APPEAL from the judgment of the Queen's Bench Division (23 Q. B. D. 149), reversing the judgment of a county court judge.

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The facts were as follows. The plaintiffs, a local board, had in pursuance of the 69th section of the Public Health Act, 1848, duly served notices on the owners of premises fronting on a street, to do certain paving works, and on default made by them had completed the works themselves. The works were begun in 1874 and completed in 1875, but the apportionment of the expenses among the frontagers was not made till 1885. The defendants had subsequently to the completion of the works become the owners of certain premises in the street in respect of which the work had been done. In 1887 the amount of the expenses apportioned was demanded from the defendants. In 1888 the expenses in respect of such premises not having been paid, the plaintiffs brought the action in the county court, claiming a declaration that such expenses were a charge on the premises, and asking for a sale of the premises to give effect to the charge. The defence set up by the defendants was that the plaintiff's claim was barred by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8. The county court judge gave judgment for the plaintiffs. Upon appeal the Divisional Court reversed his judgment.

Shiress Will, Q.C., and *Macmorran*, for the plaintiffs. The question turns upon s. 62 (1) of the Local Government Act 1858, and s. 8 of the Real Property Limitation Act, 1874.

(1) Sect. 69 of the Act 11 & 12 Vict. c. 63, in substance provides that a local board may by notice in writing require the owners or occupiers of premises fronting on any street not being a highway, to sewer, level, &c., the same within a time to be specified in such notice "and if such order be not complied with, the said local board may, if they think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case) in manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided . . ."

21 & 22 Vict. c. 98, s. 62: "Where the local board have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner or by the

The question is, when did a "present right" to receive these expenses accrue to the board? The present right did not accrue until the charge on the land given by s. 62 of the Local Government Act, 1858, became effective and enforceable; that is, not until the apportionment of the whole expenses between the different owners was made, and a demand for payment was made by the board. A period of three months is allowed by s. 63 for disputing the apportionment. The charge cannot be enforced before the amount of it is ascertained; the apportionment is a condition precedent to the right to enforce the liability. In *Grece* v. *Hunt* (1) it was held that the six months, within which summary proceedings for the recovery of the amount apportioned upon an owner must be taken, are to be reckoned from the service upon him of a demand for payment and not from notice of the apportionment. The nature of a "present" right to receive money is illustrated by *Farran* v. *Beresford* (2); *Earle* v. *Bellingham*. (3) The statute did not intend to deprive a man

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Public Health Act, 1848, or any Act incorporated therewith, or this Act, the same may be recovered from the person who is the owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act, 1848, and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of 5*l.* per cent. per annum till payment thereof."

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343, repeals the above cited Acts (saving, however, rights and liabilities acquired, accrued, or incurred under the repealed enactments), but contains in ss. 150 and 257 provisions similar to the above.

37 & 38 Vict. c. 57, s. 8: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent, and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

(1) 2 Q. B. D. 389.

(2) 10 Cl. & F. 319.

(3) 24 Beav. 448.

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of his right by lapse of time, unless he had a "present right" capable of being enforced.

The personal remedy and the remedy by a charge on land which is given by the Act of 1858 are entirely distinct; delay in enforcing the one does not affect the right to enforce the other: *Corporation of Sunderland* v. *Alcock* (1); *Tottenham Local Board* v. *Rowell.* (2) No time is limited by the Act for the making of the apportionment: *Bradley* v. *Greenwich Board of Works.* (3) The relation of debtor and creditor is not created between the owner and the board as regards these expenses: *In re Boor.* (4)

Henn Collins, Q.C., and *Montague Lush*, for the defendants. *Tottenham Local Board* v. *Rowell* (2) decides that the charge is imposed and exists as soon as the expenses are incurred and the works completed. The principle id est certum quod certum reddi potest applies. The fact that the actual amount of the charge is not ascertained would not prevent the local authority from maintaining an action for a declaration of their right to the charge. All that is necessary that the Statute of Limitations may begin to run is, that there should be some person or persons having a present right to the charge and capable of giving a discharge for or release of the money charged. The plaintiffs were entitled to receive the money as soon as the charge was imposed, and they were capable of giving a discharge for the same. According to the plaintiffs' contention they may postpone the operation of the Statute of Limitations as long as they please by delaying to make the apportionment.

Shiress Will, Q.C., in reply. The plaintiffs might be entitled to give a release, but that is not enough. There must be a person or persons presently entitled to receive the sum charged in order that the time may begin to run. The local board is not empowered to apportion the amount. The surveyor is to do so, and there is a right of appeal to arbitration in case of dispute. If the apportionment were unreasonably delayed, it might be enforced by mandamus. Till the amount is ascertained by the apportionment there is no complete liability.

Cur. adv. vult.

(1) 51 L. J. (Ch.) 546.
(2) 15 Ch. D. 378.
(3) 3 Q. B. D. 384, 388.
(4) 40 Ch. D. 572.

Nov. 7. The following judgments were delivered:— 1889

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Lord Esher, M.R.

LORD ESHER, M.R. In this case an action was brought by a local board to enforce against the present owners of certain property a charge imposed upon such property in respect of certain works of paving which had been done by the plaintiffs. The defence set up by the defendants is that the claim of the plaintiffs is barred by the Statute of Limitations. We have, in dealing with the question so raised, to consider what is the true construction of two enactments. The first question that arises is the question when under the 21 & 22 Vict. c. 98, s. 62, the charge is imposed on the premises. That point was really decided in the case of *Tottenham Local Board* v. *Rowell* (1), a decision which was afterwards followed by North, J., in the case of *In re Bettesworth & Richer* (2). It was there held that the charge is imposed as soon as the works are completed. In that case we applied the rule of construction, upon which we have acted in so many cases, viz., that an Act of Parliament is to be construed according to the ordinary meaning of the words in the English language, as applied to the subject matter, unless there is some very strong ground, derived from the context or reason, why it should not be so construed. The result is that the charge in the present case was imposed in 1875, when the works were completed. The action was not brought within twelve years from that time. Then comes the question, what is the construction of the Statute of Limitations upon which reliance was placed, viz., 37 & 38 Vict. c. 57, s. 8. We must apply to that enactment the canon of construction to which I have already alluded. The section provides that "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, in law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." It was strongly argued that the words "present right to receive the same" in this section are equivalent to "present right to enforce payment of the same." If there were some overwhelming reason why that

(1) 15 Ch. D. 378. (2) 37 Ch. D. 535.

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construction should be given to the words; if that were the only construction that would render the procedure sensible, I think possibly the words might receive that construction, but I do not think it would be their ordinary meaning in the English language. A present right to receive is not in ordinary English the same as a present right to enforce payment. Then is there any overwhelming reason why we should read the words otherwise than in their natural sense? So far from that, I think that in the present case to read the words in the way suggested for the plaintiffs would raise insuperable difficulties, whereas to read them in their natural sense makes the whole legislation sensible and easy of application. The difficulty that arises on the plaintiffs' construction has been pointed out, viz., that the board, who have to receive the money, and also to apportion the amount, would have the power to delay the application of the Statute of Limitations for any time they pleased. When that difficulty was presented, the plaintiffs' counsel endeavoured to meet it by the ingenious suggestion that, if the apportionment were not made within a reasonable time, the making of it might be enforced by mandamus; and other modes were suggested of meeting the difficulty. But why should we embark on such questions and invent means of overcoming this difficulty, when by reading the words in their ordinary sense no such difficulty arises? The charge exists, though the exact amount charged may not be ascertained. It is suggested that a person in whose favour a charge is imposed cannot be entitled to receive an amount which is not ascertained. I do not see why this should be so. A sum may be offered to him, which the person offering it thinks to be the right sum, and which he may also think to be the right sum, although the actual calculation of the exact amount has not been made. What is there in law, or reason, or business, to shew that he is not entitled to receive the sum when so offered to him? I cannot see any difficulty in saying that there is a present right to receive the expenses. In the case where a person has only a reversionary right to receive money, or for some other reason the time when he is entitled to receive the money has not yet arrived, it would be different, and there would be no present right to receive the money. Then there must by the section be

a present right to receive the money, which has "accrued to some person capable of giving a discharge for or release of the same." If a person has the right to receive a sum of money, and does receive it, assuming him to be subject to no legal incapacity, why cannot he give a receipt for it; and what is a receipt, but a discharge? There may be persons who are subject to some legal incapacity which would prevent them from giving a receipt or discharge, so as to bind them, such as infants or lunatics, and it is to meet such cases I think that the words "capable of giving a discharge" were probably inserted. So, reading the words of the section in their ordinary sense, it seems to me that in the present case the local board were a body of persons in whose favour a charge existed for a sum of money, who were entitled to receive it, and who were capable of giving a receipt or discharge for it, although there had not yet been an apportionment of the exact amount. They were entitled to receive a sum offered to them, if they thought it to be the right sum, and they were not under any incapacity disabling them from giving a discharge to the person paying such sum of money. It seems to me therefore that the case comes within the words of the section read in their ordinary sense, and that there is no reason for giving them any other construction. Consequently the claim of the plaintiffs is barred by the Statute of Limitations.

LINDLEY, L.J. This case turns upon the true construction of the enactment relating to the public health under which the charge is imposed, and the Real Property Limitation Act, 37 & 38 Vict. c. 57. It is not necessary to allude to the various provisions of the Public Health Act with regard to the power of the authority to do the works, further than by saying that the local authority in this case did under the authority of the Act, and after duly giving the notices required thereby, execute certain works. The works were begun in 1874 and completed in 1875. The apportionment took place in 1885, and a demand for the apportioned sum was subsequently made. The present action is for the purpose of raising a charge on land on which the apportioned sum is alleged to be chargeable; and the defence set up is the Statute of Limitations. It is obvious that, if there

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was a present right to receive the sum charged when the works were completed, that is to say in 1875, the Statute of Limitations would be a bar to the action, whereas, if there were no present right to receive the sum of money so charged until the apportionment or notice of demand, then the action was brought within the period of twelve years during which it is permitted by the statute to be brought. The section now applicable in such cases is the 257th section of the Public Health Act, 1875; even if this case is governed by the corresponding provision of the earlier Act, that provision is substantially to the same effect.

On examining the terms of the legislation on the subject, it will be found that there are two distinct remedies for these expenses. One is the summary remedy against the person who is owner of the premises at the time when the works are completed; the other is the remedy by way of charge on the premises themselves. There is a special period of limitation with regard to the summary remedy. That must be enforced within six months after the notice of demand, as appears from *Grece* v. *Hunt* (1) and other cases. We are now dealing with the alternative remedy by way of charge on the premises. The period of limitation with regard to that is that given by the 8th section of 37 & 38 Vict. c. 57, which provides that "no action or suit shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." The terms of that section are substantially a repetition of the phraseology of the corresponding section in the older statute, 3 & 4 Wm. 4, c. 27. We thought it desirable to see whether the construction of the words, which we were inclined to think the correct one, was in any way inconsistent with any of the decisions upon the older enactment. I have looked at the older decisions and, so far as I can see, it appears to me that the construction we are now putting on the section is not inconsistent with any of them.

It was early pointed out, when those words "present right to

(1) 2 Q. B. D. 389.

receive" were discussed, that the language there used was different from and apparently used in contrast to the expression in s. 2 of 3 & 4 Wm. 4, c. 27, which spoke of the right of action first accruing. The two expressions are used in the same Act, and apparently do not mean the same thing. The expression "present right to receive" is a little ambiguous, and, in considering what construction it is proper to put upon it, we must look a little at the object of the Act and the consequences of the rival constructions respectively. If one construction produces consequences in conformity with the scope of the enactment, and with the consequences which follow from the constructions put upon other enactments of the same sort, while the rival construction introduces a startling novelty, no lawyer would adopt the latter construction. If we read "present right to receive" in the sense in which the Master of the Rolls has explained, and as distinguishable, as apparently it is meant to be, from "present right to sue," everything works out harmoniously; the moment the time of the coming into existence of the charge is ascertained, the period of limitation will begin to run: whereas, if the opposite construction is adopted, we are at once landed in the curious anomaly that the creditor, that is to say, the person who is entitled to the charge, can by his own act postpone his right to sue indefinitely, subject of course to the question as to an application for a mandamus. Such a result would be extremely anomalous. Who ever heard, with reference to any Statute of Limitations, that a creditor could enlarge the time for suing indefinitely by omitting to do that which it is his duty by statute or common law to do? It appears to me that we ought not to adopt a construction of the statute that leads to such a result, unless we are driven to it. I do not think we are driven to it. When one looks a little more closely at the 8th section, I think it will be seen very clearly what is meant by it. The section is dealing with charges on land, and it must be borne in mind that such charges are present charges and future charges, reversionary charges, charges in remainder, and such like. One general form of expression is used to include the whole, and that expression is "present right to receive." It seems to me clear that the meaning is that in each case the moment to be looked to is the

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moment when the charge comes into present operation; for instance, when reversionary charges are being dealt with, the moment to be looked to is the moment when the reversion falls in and the charge takes effect in possession. With regard to the other expression contained in the section, viz. "capable of giving a discharge, &c.," that seems to have been inserted to meet the case where a person is not legally capable of giving a discharge. The conclusion of the whole matter appears to me to be this. It has been settled by this Court, in the case of *Tottenham Local Board* v. *Rowell* (1), which has been followed by North, J., in *In re Bettesworth and Richer* (2), that the charge is a present existing charge as from the time of the completion of the works. The actual amount, no doubt, has to be ascertained, but the charge exists, and, that being so, I do not see any great difficulty in saying that there is a present right to receive it, although the exact amount is not reduced to pounds, shillings, and pence. If that seems at first sight a strained view, let me illustrate it by a case common enough. When a partnership is dissolved, each partner has a present right to receive what on taking the accounts he may be shewn to be entitled to. So in the present case there may be a present right to receive this charge, although the exact amount is not ascertained. Such small amount of difficulty (if any) as there may be about this view of the matter seems to me more than counterbalanced by the extreme difficulty in which we should be landed by the other construction. I know of no decided case under the old Statute of Limitations that is inconsistent with the view we take. In the case of *Earle* v. *Bellingham* (3), where Romilly, M.R., held, and very properly held, that the time for computing interest on a legacy ran from a particular date, there are, no doubt, some observations which seem to shew that he was of opinion that the time from which such interest ran was necessarily the same as that referred to in the Statute of Limitations; and he does appear to have thrown out an intimation that in the case of a legacy the Statute of Limitations does not begin to run till twelve months after the death of the testator. That was, however, merely an obiter

(1) 15 Ch. D. 378. (2) 36 Ch. D. 535.

(3) 24 Beav. 448.

dictum, and I doubt whether that view was correct. Be that as it may, we have now to consider the application of the Statute of Limitations to a charge created under the Public Health Act. I think the view taken by the Divisional Court was correct, and that a present right to receive the amount of the charge did accrue, within the meaning of the Real Property Limitation Act, at the time when the works were completed.

LOPES, L.J. This case raises an important question under the Real Property Limitation Act, 1874. I entirely agree with the judgments of the Master of the Rolls and my brother Lindley. The contention of the plaintiffs is that the period of twelve years prescribed by the Real Property Limitation Act, 1874, did not begin to run until after the amount of the expenses chargeable had been ascertained by the apportionment in 1885, because, as they say, a present right to receive the amount had not before that time accrued to any person capable of giving a discharge for or release of the same. The defendants, on the other hand, contend that the twelve years began to run in 1875, when the expenses were incurred and the works completed. It was insisted by the plaintiffs that a present right to receive means the same thing as a present effective right which can be enforced by action. I cannot see any reason why this statute is not to be read according to the ordinary grammatical construction of the words. The case of *Tottenham Local Board* v. *Rowell* (1), which has been already referred to, establishes that, when the expenses have been incurred and the works are completed, such expenses become then and there a charge imposed on the premises by the statute. When, then, does the right accrue to the person or persons in whose favour the charge is imposed to receive the amount secured by the charge? It appears to me that it accrues the moment the charge is imposed on the premises by the statute, that is when the expenses have been incurred and the works completed. It may be that certain things have to be done before the right can be enforced, but the right to receive what is secured by the charge arises concurrently with the charge. The words are "present right to receive," not "present right to

(1) 15 Ch. D. 378.

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recover." The right to receive may exist though the definite sum to be received has not yet been ascertained. There are cases where the legislature requires a notice to be given before an action can be maintained. The right of action however exists as soon as an actionable wrong has been committed, though it cannot be successfully enforced until the statutory requirements are complied with. Many other illustrations of the same kind might be given. Then there are the words in the section "to some person capable of giving a discharge for or release of the same." I think those words were inserted in order to exclude persons who are legally incapacitated, such as infants or lunatics. The construction of the Real Property Limitation Act which we are adopting is in accordance with the literal meaning of the words, and is consistent with the objects and spirit of the Act. The construction which the plaintiffs seek to put upon it would be highly inconvenient and might postpone claims made by a local authority to an indefinite period, because they could delay the apportionment for any time they thought fit: and the result would be that in respect of charges such as these the uncertainty would still remain with regard to long outstanding claims which the statute seeks to alleviate. I think, therefore, that the decision of the Divisional Court was correct, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Tathams & Hardy.*
Solicitors for defendants: *W. H. Withall & Co.*

E. L.

[IN THE COURT OF APPEAL.]

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Nov. 21.

GLASSCOCK *v.* BALLS.

Promissory Note—Negotiable Instrument—Promissory Note payable on Demand —Mortgage by way of Further Security—Sum received on Transfer of Mortgage — Payment — Non-extinguishment of Note — Indorsement for Value without Notice—Re-issue of Note, what amounts to.

The payee of a promissory note payable on demand, which had been given by the defendant by way of security for a debt, had also taken from the defendant, as a further security for the same debt, a mortgage of certain property. He transferred the mortgage to another person, receiving on such transfer from the transferee a sum equal to the amount of the debt. He subsequently indorsed the promissory note which remained in his hands to the plaintiff for value, the plaintiff having no knowledge of the circumstances:—

Held, that the note, not having been paid or returned to the maker, was still current at the time of the indorsement, and the plaintiff as a bonâ fide indorsee for value was entitled to recover upon it.

Bartrum v. *Caddy* (9 A. & E. 275) distinguished.

APPEAL of defendant from the judgment of Lord Coleridge, C.J., at the trial.

The facts were as follows. The plaintiff as indorsee sued the defendant as maker of a promissory note. The defendant had on October 11, 1882, given to one Wayman a promissory note payable to his order on demand for the sum of 289*l.*, being the note sued upon, as security for a debt. Subsequently, the defendant being then indebted to Wayman in the sum of 641*l.*, as security for part of which Wayman held the note, the latter required further security: and the defendant executed a mortgage to him of certain property to secure the total debt, with a covenant for payment of the mortgage debt. A memorandum was made at the same time to the effect that the mortgage was to be an extra security for the amount secured by the promissory note. Wayman afterwards transferred the mortgage by a deed of statutory transfer in the form given by the Conveyancing Act, 1881, to one Hall, receiving from the latter upon such transfer the sum of 700*l.* The note remaining in the hands of Wayman after the transfer of the mortgage, he indorsed it to the plaintiff as security for a debt of 200*l.* due from him to the plaintiff. It was admitted

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that the plaintiff took the note without any knowledge of the before-mentioned circumstances. After such indorsement Wayman paid to the plaintiff 60*l.* on account of his debt. The Lord Chief Justice gave judgment for the plaintiff upon the note for 140*l.*, the balance of the debt of 200*l.*, after deducting the payment on account.

H. Tindal Atkinson, for the defendant. If a negotiable instrument is paid at maturity, it is extinguished, and cannot afterwards be put in circulation. A note payable on demand is payable immediately. In this case there was the equivalent of payment of the note when the mortgage security was realized by transfer and the payee received the amount of the note on such realization. The indebtedness of the defendant to the payee was then discharged; and the note being thereby extinguished could not be indorsed afterwards: *Freakley* v. *Fox*. (1) The payee could not then have sued on the note, and his title to it was gone. He merely held it as trustee for the maker. The note, being extinguished, cannot be put into circulation afterwards, for that would amount to a re-issue of the note, and a note payable on demand cannot be re-issued after payment by the maker: *Bartrum* v. *Caddy*. (2)

[LORD ESHER, M.R. That case decided that a note which had been paid by the maker and delivered back to him could not be re-issued by him by reason of the Stamp Laws. Here the note never got back to the hands of the maker.]

If the note was extinguished and discharged in the hands of the payee, and he could not sue on it, circulating it afterwards really amounted to a re-issue of it without a fresh stamp. The payee, when the note was satisfied, really held it as the maker's agent, and so it may be said to have come back to the maker. There was no laches on the part of the defendant in this case in leaving the note in the payee's possession, because it was not suggested that the defendant knew that the payee had realized the money due by transfer of the mortgage security.

[He also cited *Roberts* v. *Eden* (3); *Beck* v. *Robley* (4); *Thoro-*

(1) 9 B. & C. 130.
(2) 9 Ad. & E. 275.
(3) 1 B. & P. 398.
(4) 1 H. Bl. 89, n. (a).

good v. *Clarke* (1); *Morley* v. *Culverwell* (2); and Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 86.].

Horace Browne, and *A. McPherson*, for the plaintiff, were not called upon.

LORD ESHER, M.R. In this case the plaintiff sues the maker of a promissory note payable on demand as indorsee. It was admitted that the plaintiff was indorsee of the note for value without notice of anything that had occurred. The plaintiff cannot be said to have taken the note when overdue, because it was not shewn that payment was ever applied for, and the cases shew that such a note is not to be treated as overdue merely because it is payable on demand and bears date some time back. Under such circumstances primâ facie the indorsee for value without notice is entitled to recover on the note. It lies on the defendant to bring the case within some recognised rule which would prevent such an indorsee from recovering upon the note. It has been held that there may be a defence to an action by a bonâ fide indorsee for value, where the note has been paid and has come back into the maker's hands before it was indorsed to the plaintiff. That defence does not arise in respect of any merits of the defendant, but because the Stamp Act has not been complied with. In such a case it has been held that there was a re-issue of the note, and therefore the case stood on the same footing as if the note had been then issued for the first time without a stamp. The effect of non-compliance with the stamp laws is that the note is not a negotiable instrument and is not capable of indorsement. Such a defence only arises where there has been a re-issue of the note. The note cannot be said to be re-issued, unless it gets back again into the power or control of the maker. I do not say it would be necessary that it should actually come back into his hands; it might be enough, I think, if it came into the hands of some agent for him. If a negotiable instrument remains current, even though it has been paid, there is nothing to prevent a person to whom it has been indorsed for value without knowledge that it has been paid from suing. This case is not within the rule applicable to such cases

(1) 2 Stark. 251.

(2) 7 M. & W. 174.

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as *Bartrum* v. *Caddy* (1) for two reasons. First, the note here has not been paid. Nothing has happened which would prove a plea of payment. Something has happened which would entitle the maker to certain rights as against the payee, but which is not payment of the note. The maker might be entitled to an injunction to prevent the payee from suing on the note, but there has not been a payment of the note. It was said by the defendant's counsel that the note was extinguished. I cannot say I understand the meaning of the term "extinguished" as used in the argument. I never heard of a plea of extinguishment of a bill or note. Secondly, this case cannot be brought within the case that was cited, because, even if the note could be treated as paid, it never came back into the power or control of the maker, and therefore cannot be said to have been re-issued. No other principle could be suggested by the defendant under which the case could be brought, and therefore it must come under the general principle that the maker of the note, having issued it and allowed it to be in circulation as a negotiable instrument, is liable upon it to an indorsee for value without notice of anything wrong. For these reasons I think the appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. I think that the defendant fails to establish a defence either at law or in equity. The mortgage given by the defendant to the payee of the note was accompanied by a memorandum which prevented any merger of the debt for which the note was given. It is a mistake to speak of the transfer of the mortgage as a realization of that security. Realization would be by foreclosure or sale. It is quite true that, as between the defendant and the payee of the note, after the transfer of the mortgage, in equity the right of the payee to sue on the note for his own benefit ceased, because he had parted with all his interest and could only hold the note as trustee for the mortgagor or for the transferee as the case might be, and the payee therefore could be restrained by injunction from suing on the note, unless he were entitled to sue as trustee for the transferee of the mortgage, which would depend upon the agreement between the parties. That would be the

(1) 9 Ad. & E. 275.

equitable right of the defendant as against the payee. But, when the note gets into the hands of a bonâ fide indorsee for value without notice of the facts, there can be no such equity as against him.

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LOPES, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Torr & Co., for A. J. Lyon.*
Solicitors for defendant: *F. & T. Smith & Sons, for Peed.*

E. L.

[IN THE COURT OF APPEAL.]

PHILIPPS AND ANOTHER *v.* REES.

Oct. 31.

Landlord and Tenant—Distress for Rent—Percentage for levying Distress—Bailiff's Fee for Levy—Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 49, *Sched.* 2.

In distress for rent under the Agricultural Holdings Act, 1883, the bailiff and not the landlord is entitled to the percentage for levying distress authorized by sched. 2 of that Act.

Coode v. *Johns* (17 Q. B. D. 714) overruled.

APPEAL from a judgment of a Divisional Court on a special case raising the question whether the landlord or the bailiff is entitled upon a distress for rent under the Agricultural Holdings Act, 1883, to the percentage for "levying distress" authorized by sched. 2 of that Act.

The plaintiffs were the owners and landlords of a farm in the county of Pembroke, of which John Beddoe was tenant at a yearly rent of 200*l.* The defendant was a person authorized to act as bailiff to levy distresses in the district wherein the farm is situated, under s. 52 of the Agricultural Holdings Act, 1883.

On the 8th of November, 1886, there being rent in arrear to the amount of 300*l.*, the defendant was employed to distrain for the same on the goods of the tenant, and distrained accordingly. On the 18th November, a clerk of the plaintiffs' solicitors called with the tenant on the defendant and informed him that an arrangement had been come to between the parties as to the rent, and thereupon the tenant paid the defendant the sum of 11*l.* 10*s.*,

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made up of 7*l.* 10*s.*, the percentage specified in schedule 2 of the Agricultural Holdings Act, 1883, for "levying distress;" 1*l.* 1*s.* specified in the same schedule, under the heading "to bailiff for levy;" and 2*l.* 19*s.* for the man in possession, and other costs. The action was brought to recover the above-mentioned sum of 7*l.* 10*s.* The special case set out other facts on which a counter-claim was based, but which it is unnecessary to notice.

The 49th section of the Agricultural Holdings Act, 1883, enacts, "No person whatever making any distress for rent on a holding to which this Act applies when the sum demanded and due shall exceed the sum of 20*l.* for and in respect of such rent, shall be entitled to any other or more costs and charges for and in respect of such distress or any matter or thing done therein than such as are fixed and set forth in the second schedule hereto." The second schedule is as follows:

"Levying distress. 3 per centum on any sum exceeding 20*l.* and not exceeding 50*l.* 2½ per centum on any sum exceeding 50*l.*

"To bailiff for levy, 1*l.* 1*s.*

"To man in possession, if boarded, 3*s.* 6*d.* per day; if not boarded, 5*s.* per day.

"For advertisements the sum actually paid.

"To auctioneer, for sale £5 per centum on the sum realized not exceeding 100*l.*, and 4 per centum on any additional sum realized not exceeding 100*l.*, and on any sum exceeding 200*l.* 3 per centum. A fraction of 1*l.* to be in all cases considered 1*l.*

"Reasonable costs and charges where distress is withdrawn or where no sale takes place, and for negotiations between landlord and tenant respecting the distress; such costs and charges in case the parties differ to be taxed by the registrar of the county court of the district in which the distress is made."

The case came before a Divisional Court, who decided in favour of the plaintiffs on the authority of *Coode* v. *Johns.* (1)

The defendant appealed.

Bowen Rowlands, Q.C., and *J. Alderson Foote*, for the defendant. The person making the distress mentioned in s. 49 is the person who goes to the premises and raises the money, and

(1) 17 Q. B. D. 714.

he is the person entitled to make the charges set out in the schedule. The Act was not intended to give the landlord a percentage on his claim to which, before the Act, he was not entitled, but to regulate the bailiff's charges. Of the earlier Acts, 2 Wm. & M., sess. 1, c. 5, s. 2, speaks only of the person distraining, and in 57 Geo. 3, c. 93, for regulating the costs of distresses levied for payment of small rents, the 3*s.* for "levying distress" went to the broker. The Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21, which repeals s. 49 of the Act of 1883, by s. 8 gave the Lord Chancellor power to make rules for regulating the fees, charges, and expenses in and incidental to distresses, and the schedule to the rules made under that Act (1) omits the guinea to bailiff for levy, but leaves the other charges much as they stood under the former Act. If therefore the broker is not to get the percentage he will now get no payment at all.

Gore, for the plaintiffs. There is a distinction between making and levying a distress. The former includes all that goes to make up the distress as a whole and the person who makes it is the landlord. The Act of 1888 authorizing the Lord Chancellor to make rules was passed in view of the decision in *Coode* v. *Johns* (2), and it does not follow that if that case is supported the same interpretation is to be placed on the new rule, for the words used are different and the contrast is omitted. (3) [He cited *Harding* v. *Hall*. (4)]

J. Alderson Foote, in reply.

LORD ESHER, M.R. The question in this case turns on the true construction of s. 49 of the Agricultural Holdings Act, 1883.

(1) Rules made pursuant to s. 8 of the Law of Distress Amendment Act, 1888, August 31, 1888.

(2) 17 Q. B. D. 714.

(3) Rules made pursuant to s. 8 of the Law of Distress Amendment Act, 1888. August 31, 1888. "15. No person shall be entitled to any fees, charges, or expenses for levying a distress, or for doing any act or thing in relation thereto, other than those specified in, and authorized by, the table in Appendix 2 to these rules."

Appendix 2, scale 1, under the title "Distresses for rent where the sum demanded and due shall exceed 20*l*," contains items "for levying distress," "for man in possession," and other matters, but contains no item corresponding to that in the Act of 1883 "to bailiff for levy."

(4) 14 L. T. (N.S.) 410.

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The same point that is now raised was before a Divisional Court in 1886 in *Coode* v. *Johns* (1), and it was then decided in favour of the landlord. What we are asked to do is to say that we do not agree with that decision. In order to construe the section we are entitled to consider the state of the law at the time it was enacted. A landlord had a right when rent was in arrear to distrain sufficient goods to meet the amount due and the expenses of realizing it by means of the distress. The ordinary mode of carrying out a distress was by means of a bailiff who put a man in possession, employed an auctioneer to make an inventory, and to sell the goods seized, and when that was done the money matters were arranged. This involved settling the rights between the landlord and the bailiff. Now the bailiff was selected as the agent of the landlord to do something which he might have done himself. The usual course was for the landlord not to give express directions as to what was to be done, but to leave the matter to the bailiff with general instructions to distrain. The relation of principal and agent was created, and there was an implied contract, of which the law took notice, that the bailiff should be paid a reasonable sum for his services, and he was entitled to retain a reasonable amount out of the proceeds of the distress. What was a reasonable amount also came to be a matter of custom of which the law took notice, and in most parts of England it amounted to 5 per cent. In this state of things the evil which required to be remedied was the unfairly large sum levied from the tenant for expenses. Accordingly the Act of 1883 fixed the amount of the charges. This was done in the interest of the tenant, and it seems to me that the object of the Act was not to interfere with the implied contract between the landlord and the bailiff, and that there is nothing to shew any intention to go beyond the object I have mentioned—the relief of the tenant. The words of sect. 49 are wide enough to include the bailiff or the landlord if he himself makes the distress. It is not said to whom the payment is to be made, and it does not matter to the tenant which of them is to receive it. If there is no alteration in the relation between the landlord and the bailiff, and nothing to shew that it was intended that the landlord should receive anything more than

(1) 17 Q. B. D. 714.

that which he received before the Act—that is the rent—then the implied contract remains and the bailiff is entitled to his charges. Then the second schedule gives the amount of the costs and charges. As to the first item, "levying distress," the essential point to the tenant is not who is to receive the amount but what the amount is to be. It seems to me that that item and the next, "to bailiff for levy 1*l.* 1*s.*," were substituted for the sums which the bailiff by custom received before the Act was passed. If so, those are the amounts which the bailiff may retain out of the money he may realize. Under these circumstances, if I had had to decide the point in an appeal in *Coode* v. *Johns* (1), I could not have agreed with the decision of the Divisional Court. That being so, is there anything in the circumstances to prevent our now deciding in accordance with this view? If this were a contract in daily use, and if the decision had been acted on throughout the country for a long time, it might be that we should feel bound to follow it, on the ground of the number of persons who had acted on it, even though we did not agree with it. But that is not the case here, and I do not think there is anything to prevent our adopting what we think is the right interpretation of the statute. I think, therefore, that the appeal must be allowed.

LINDLEY, L.J. The question turns on the true construction of one or two sections of the Act of 1883 and on the second schedule to that Act. In order to construe that Act rightly, it is necessary to bear in mind how the law stood at the time it was passed. At common law a landlord had no right to sell goods seized under a distress, all he could do was to hold them for the rent due and the reasonable expenses of the seizure. Later on the Act of William and Mary gave a landlord the right to sell. So far there was no scale of charges fixed, but they were to be reasonable. We know that the charges were often extortionate, and in consequence the Act of 57 Geo. 3, c. 93, established charges beyond which nothing could be lawfully demanded. That Act only applied to distresses for small amounts and in other cases the law remained as before. In point of fact the money retained for charges never went to the landlord, who got only that to which he was entitled—his rent.

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The Agricultural Holdings Act, 1883, altered the law by substituting a tariff for the reasonable charges in such cases. Sect. 49 does not say who is to receive those charges, the expression used is a universal negative, "no person making a distress shall be entitled," that is to say, the Act does not touch the right to the money but only the amount, and leaves the former as it was. The contention was that after the Act the landlord was to receive these charges which he would not have received before. That argument is based on the different wording of the first two items in the schedule, in consequence of which we are asked to say that whereas before the bailiff got his reasonable costs he would, after the passing of the Act, receive only a guinea in each case. Such a construction would, in my opinion, lead to an unreasonable result, and I think we are bound to treat the first two items in the schedule as substituted for the 5 per cent. which was the customary charge. I am unable, therefore, to concur in the decision which has been cited, and I think the appeal must be allowed.

LOPES, L.J. The question in this case, whether the landlord or the bailiff is entitled to the percentage on levying a distress, is precisely the same as that which came before a Divisional Court in *Coode* v. *Johns*. (1) I am unable to agree with that decision, for I am of opinion that the person entitled to the percentage is the bailiff and not the landlord. In determining the question it is advisable to consider how the law stood before the passing of the Act of 1883. The bailiff who executed the warrant included in his levy sufficient to meet his reasonable remuneration. This sum was generally 1*s.* in the pound. The landlord received the rent and the bailiff retained the percentage. It is clear that the Act of 1883 was not intended to make any alteration as to the person who was to receive the percentage, but was intended to protect tenants from extortion. It occurs to me to ask what reason there could be for giving to the landlord that which he did not get before. As a matter of fact the landlord incurs no expense, he simply in the majority of cases gives the bailiff instructions to distrain. The bailiff on the other hand has

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or may have considerable expenses in travelling, for lodging, and in other ways. It seems to me reasonable that this percentage should be payable to him, and I think it was preserved to him by the Act. I do not think the Law of Distress Amendment Act, 1888, can affect the construction of the previous Act, but if it does or can affect it, the later Act would confirm the view I take of the former Act. The words used are the same as those used in the schedule to the Act of 1883, "levying distress" and the omission of the 1*l.* 1*s.* for "to bailiff for levy" would leave the bailiff without any remuneration, unless he is to receive the percentage for "levying distress." The conclusion, therefore, at which I arrive is that the decision in *Coode* v. *Johns* (1) cannot be supported and that this appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Peacock & Goddard, for Eaton Evans & Williams, Haverfordwest.*

Solicitors for defendant: *Prior, Church, & Adams, for James Price, Haverfordwest.*

A. M.

[IN THE COURT OF APPEAL.]

Nov. 19.

SMITH *v.* WOOD.

Metropolis—Coals—Sale and Delivery—Deficient Weight—Mode of weighing—Recovery of Penalties—Metropolis Coal Act, 1831 (1 & 2 *Wm.* 4, *c. lxxvi.*), *ss.* 54, 57 (*local*).

The plaintiff purchased coal from the defendant in the metropolis, and on delivery of the same required the defendant's carman to weigh some of the sacks in which it was contained. The carman weighed the sacks by putting each of the full sacks in one scale and an empty sack together with the weights in the other scale. In an action for penalties under 1 & 2 Wm. 4, c. lxxvi., in respect of a deficiency of weight in the sacks so weighed:—

Held (affirming the judgment of the Queen's Bench Division), that as the method of weighing prescribed by the section—viz., weighing the sacks "both with and without the coals therein"—had not been followed, the plaintiff was not entitled to recover.

Meredith v. *Holman* (16 M. & W. 798) approved.

APPEAL from the judgment of the Queen's Bench Division (reported 23 Q. B. D. 380).

(1) 17 Q. B. D. 714.

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The action was brought to recover penalties under the Metropolis Coal Act, 1831 (1 & 2 Wm. 4, c. lxxvi), s. 57 (local), from a vendor of coals for delivering sacks deficient in weight. (1)

At the trial the plaintiff gave evidence of the following facts:—

The plaintiff ordered from the defendant, who was a coal merchant, one ton of coals to be delivered at the plaintiff's house in London. Ten sacks of coal, each of which should have contained 224 lbs., were accordingly sent to the plaintiff by the defendant from one of his warehouses or depôts in London in a cart which was in charge of one of his carmen. The plaintiff required the carman to weigh seven of the sacks in the presence

(1) 1 & 2 Wm. 4, c. lxxvi., s. 54: "The carman or driver of any cart, waggon, or other carriage in which coals shall be carried in sacks for delivery to the purchaser or purchasers thereof, from any ship, lighter, barge, or other craft, or from any wharf, warehouse, or other place within the cities of London and Westminster, or within the distance of twenty-five miles from the Post Office aforesaid, shall and he is hereby directed to weigh, if he shall be required so to do, any one or more of the sacks contained in any such cart, waggon, or other carriage, which may be chosen by the purchaser or purchasers of the said coals, or his, her, or their servant or servants, or other person or persons acting on the behalf of any such purchaser or purchasers, with the coals therein, and also afterwards to weigh in like manner such sack without any coals therein."

Sect. 57: "Such purchaser or purchasers, or his, her, or their servant or servants, or other person or persons as aforesaid, so desiring such coals contained in such cart, waggon, or other carriage to be weighed, shall, and he, she, or they is and are hereby required to procure the attendance of some constable, police-officer, or other indifferent and credible person, to be present at the weighing of such coals; and all the sacks, both with and without the coals therein, shall accordingly be weighed with the said machine by the carman or other person attending such cart, waggon, or other carriage, in the presence of the purchaser or purchasers of the said coals, or of his, her, or their agent or servant, agents or servants, if they or any of them shall attend to see the same weighed, and of such constable, police-officer, or other person; . . . and in case such carman or other person shall refuse or neglect to weigh such sacks, or any of them, in manner aforesaid, he shall forfeit and pay for such offence any sum not exceeding ten pounds; and the constable, police-officer, or any other person who may be present, may weigh the said sacks or any of them, as aforesaid; and in case upon the weighing of any such sack it shall happen that any sack or sacks shall not contain either one hundred and twelve pounds or two hundred and twenty-four pounds net of coals, as the case may be, then and in every such case the seller or sellers of such coals shall for every such sack of coals that shall be so found deficient forfeit and pay any sum not exceeding five pounds."

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of a constable of the Metropolitan Police whose attendance was duly procured by the plaintiff. The seven sacks were thereupon weighed by the carman, but instead of first weighing each sack with the coal in it and then weighing the empty sack by itself, the carman placed each sack containing the coal in one scale of the weighing machine, and an empty sack together with the weights in the other scale. It appeared on such weighing that the coal in each of the sacks weighed less than 224 lbs. net.

The case was tried before Wills, J., and a jury, when it was contended on behalf of the defendant that a condition precedent to the right to recover the penalty had not been complied with, inasmuch as the carman, not having been asked by the plaintiff to do so, did not weigh the sacks "both with and without the coals therein" as required by 1 & 2 Wm. 4, c. lxxvi., s. 57.

The learned judge overruled the objection and the jury fixed the amount of the penalties at 10*l.* 10*s.*, for which judgment was given. This judgment was set aside by the Divisional Court, and judgment entered for the defendant. (1)

The plaintiff appealed.

J. B. Walker, and *Blackwell*, for the plaintiff. The whole scope of the statute should be looked at. It was intended to check fraud by giving purchasers an action for penalties where short deliveries are made. The statute only requires the purchaser to demand that the coals shall be weighed, and the person to whom the request is made ought not to have the power of enabling the vendor to escape liability by adopting some other method of weighing than that pointed out by the statute. Admitting that *Meredith* v. *Holman* (2) is in point, it is submitted that that case was wrongly decided and should be overruled.

Cock, Q.C., and *Chester Jones*, for the defendant, were not called on.

LORD ESHER, M.R. I do not feel prepared to overrule, as we have been invited to do, the case of *Meredith* v. *Holman* (2), decided so long ago as 1847, on the contrary, I think that, when the matter is thought out, that decision appears to be obviously

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a right one. The sacks in which the coals are may differ in weight, and if the weighing is not done as directed by the Act, but in some other mode such as that adopted in this case, persons might be subjected to penalties when in fact they ought not to be. Considering the class of persons who have to do the weighing, the legislature took particular care to direct a mode of weighing which must accurately shew the net weight of the coals. Then it is directed that if by such weighing a deficiency is discovered penalties can be recovered. The mode of weighing prescribed by the Act is a condition precedent to the recovery of the penalties. It has not been complied with and the plaintiff therefore is not entitled to succeed. The appeal must be dismissed.

LINDLEY, L.J. I am of opinion that on a proper construction of the Act this action for penalties cannot succeed. In one way I am sorry for this, for the deficiency in the present case was far too great to be accounted for by a difference in the weight of the sacks. However, the question for us is, what is the meaning of the Act? It prescribes that within a certain radius of the Post Office coal shall be sold by weight and not by measure (s. 43), and that when the amount sold exceeds 560 lbs. it is to be carried and delivered in sacks, each sack containing 112 or 224 lbs. net (s. 48), and the carman is to carry a weighing-machine in his cart (s. 52). Then by s. 54 the method of weighing is prescribed—that is, the sacks chosen by the purchaser are to be weighed with the coals therein, and then without the coals. The difference gives the net weight of the coal. Sect. 57 is to the same effect, for it speaks of the sacks being weighed "both with and without the coals therein." Unfortunately that method of weighing was not followed in this case, but looking at the Act it seems to me that the decision in *Meredith* v. *Holman* (1) was right, and that if it is desired to sue for penalties under the Act it is necessary that the method of weighing prescribed by the Act should have been followed.

LOPES, L.J. This is a penal statute and should therefore be construed strictly. To my mind it is clear that in the present

(1) 16 M. & W. 798.

case a condition precedent to the right to recover penalties has not been complied with. The mode of weighing prescribed by the Act has not been followed. The sacks have not been "so found deficient," that is, they have not been found deficient in the manner prescribed by the Act. I think, therefore, the judgment appealed against was right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitor for the plaintiff: *S. Roberts.*

Solicitors for the defendant: *Lewis & Sons.*

A. M.

KING *v.* THE CHARING CROSS BANK.

Nov. 12.

Practice—Prohibition—County Court—County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *s.* 127—*Rules of the Supreme Court, Order* LIX., *rr.* 1, 8*a*.

An application for a writ of prohibition to a county court may be made to a judge sitting at chambers, notwithstanding Order LIX., r. 8*a* of the Rules of the Supreme Court, December, 1888, which provides that "every application for a prohibition to a county court . . . . shall be brought by notice of motion."

Application for prohibition to a county court.

In this action, which was brought in a county court, the defendants applied to Wills, J., at chambers, under s. 127 of the County Courts Acts, 1888 (51 & 52 Vict. c. 43), for a writ of prohibition to the county court judge. Wills, J., referred the matter to the Divisional Court.

Cluer, for the defendants, in support of the application.

R. Vaughan Williams, Q.C. (*Hansell*, with him), for the plaintiff. There is a preliminary objection to the application being heard. A judge at chambers has no jurisdiction to entertain such an application. Sect. 127 of the County Courts Act, 1888, no doubt provides that "it shall be lawful for any judge of the High Court, as well during the sittings as in vacation, to hear and determine applications for writs of prohibition to any Court and to make such orders for the issuing of such writs as might have been made by the High Court;" but by Order LIX., r. 8*a*, of the Rules of the Supreme Court, December, 1888, "Every application

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for a prohibition to a county court . . . . shall be brought by notice of motion." That rule came into operation on January 11, 1889, whereas the County Courts Act became law in August, 1888, and came into force on January 1, 1889. The rule and section are inconsistent, and the rule being the later in point of date must prevail.

Cluer, for the defendants. Assuming that the rule is inconsistent with the Act it cannot operate to repeal it. But it is not inconsistent. It only prescribes the procedure that is to be adopted if the applicant chooses to make his application to the Divisional Court. It is a rule inserted in an order relating to the business of Divisional Courts, and was not intended to take away the power of making applications at chambers. Rule 1 of that order expressly provides that nothing therein contained shall be construed so as to take away or limit the power of a single judge to hear and determine any proceedings on the Crown side of the Queen's Bench Division—(of which prohibition is one)—in any case in which he has heretofore had power to do so.

MATHEW, J. It is quite clear that there is no inconsistency. It is at the option of the applicant for prohibition to proceed either at chambers or in open court. The meaning of the rule is that if the applicant adopts the latter alternative he must proceed by notice of motion instead of applying for an order nisi as under the former practice. The objection must be overruled and the case heard on the merits.

WILLS, J., concurred.

Objection overruled.

Solicitor for plaintiff: *W. T. Boydell.*
Solicitor for defendants: *C. E. Preston.*

J. F. C.

GREENHAM *v.* CHILD.
THORNTON, CLAIMANT.

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Nov. 5.

Bill of Sale—Affidavit—"Residence"—Sufficiency of Description—Business carried on at several Places—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10.

The grantor of a bill of sale lived and carried on business at A., and had two other places of business. There were goods comprised in the bill of sale at all three places, and the three addresses were stated in the bill of sale. The affidavit filed with the bill of sale stated that the grantor resided at A., but did not mention the other two places of business :—

Held, that the description of the grantor's residence in the affidavit was sufficient.

APPEAL by the plaintiff from the judgment of the judge of the Westminster County Court holding that a bill of sale was good.

In the bill of sale the grantor was described as "Alfred John Child, of 20 Avington Grove, and 72 Beckenham Road, both in the hamlet of Penge, and of 100 High Street, Croydon, all in the county of Surrey, auctioneer, surveyor, appraiser, house and estate and insurance agent."

The affidavit filed with the bill of sale (1) stated that "The said Alfred John Child resides at 20 Avington Grove, in the hamlet of Penge, in the county of Surrey, and is an auctioneer, surveyor, appraiser, house and estate and insurance agent."

The grantor resided, and carried on business as an auctioneer, surveyor or appraiser, house and estate and insurance agent, at 20 Avington Grove, Penge, and had an office at 72 Beckenham Road, Penge, and a branch office at Croydon.

There were goods comprised in the bill of sale at all the three addresses.

C. C. Scott, for the plaintiff. The description of the grantor's

(1) The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10, requires that "an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same," shall be presented to the registrar, and a copy filed, within seven clear days after the making or giving of the bill of sale.

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residence in the affidavit is insufficient. As there were goods comprised in the bill of sale at all the three addresses stated in the bill of sale, all those three addresses ought to have appeared in the affidavit. In *Hewer* v. *Cox* (1), Blackburn, J., said: "The object of the Act was to protect the present and future creditors of persons giving bills of sale of personal chattels, and to prevent such creditors from being deceived by the false appearance of the possession by one man of property which had been assigned to another." Such a description as this is not calculated to carry out that object. Suppose one of the addresses had been in Yorkshire, surely the description would have been insufficient, and the difference between the two cases is only a question of degree. In *Wallis* v. *Smith* (2) Bacon, V.C., held the statement of one address out of three not to be a sufficient description within this same section, "under which, if the person making or giving the bill of sale has two residences, they ought both to be described." It is true that in *In re Moulson, Ex parte Knightly* (3), where the grantor had a second place of business which was not stated, Bacon, V.C., said: "I think the description of the residence and occupation of the debtor in the affidavit is sufficient;" but this is no more than an obiter dictum, for he had already decided that the bill of sale was invalid.

R. M. Bray, for the claimant under the bill of sale, was not called upon.

MATHEW, J. I am of opinion that the judgment of the county court judge ought to be affirmed. The object of requiring an affidavit is to identify the grantor, and for this purpose the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10, requires that "the residence" of the grantor shall be stated. Generally speaking residence means the place where a man lives with his family, where he may be expected to be when his business does not call him away,—where he passes the night, and in respect of which he pays rates. But here it is contended that, because the grantor has two offices besides the address stated in the affidavit, these ought also to have been stated, and therefore the description is

(1) 3 E. & E. 428; 30 L. J. (Q.B.) 73. (2) W. N. 1882, p. 77.
(3) 51 L. J. (Ch.) 823.

insufficient. The case of *Hewer* v. *Cox* (1) disposes of this point. So far from assisting the argument on behalf of the plaintiff, it is an authority the other way, for the Court there held that the place where the grantors carried on business in partnership was their residence within the meaning of the statute, and that it was not necessary to state the private residence of each partner. If Bacon, V.C., ever decided as it is suggested he did in *Wallis* v. *Smith* (2), it would seem to be inconsistent with *In re Moulson.* (3)

WILLS, J. I am of the same opinion. I think it right to point out that in the later case of *In re Moulson, Ex parte Knightly* (3), Bacon, V.C., expressed an opinion contrary to what he is said to have decided in *Wallis* v. *Smith* (2), and there is nothing to shew that *Hewer* v. *Cox* (1) was called to his attention in the earlier case.

Appeal dismissed.

Solicitors for plaintiff: *Paul E. Vanderpump & Eve.*
Solicitors for claimant: *W. J. Child & Son.*

(1) 3 E. & E. 428; 30 L. J. (Q B.) 73.
(2) W. N. 1882, p. 77.
(3) 51 L. J. (Ch.) 823.

P. B. H.

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Nov. 4, 5, 11.

THE LONDON STEAMSHIP OWNERS' INSURANCE COMPANY *v.* THE GRAMPIAN STEAMSHIP COMPANY.

Insurance, Marine—Mutual Insurance Society—Construction of Rules—Lloyd's Policy—Running Down Clause—Loss not covered—Collision—Adjustment of Damage—Money which the Insured "shall become liable to pay."

The plaintiffs, a mutual marine insurance association, insured the defendants' ship against loss or damage to any other vessel, so far as not covered by Lloyd's policies with running down clause attached. The defendants' ship was insured by a Lloyd's policy, with a running down clause by which, if the ship insured should come into collision with any other ship, and the insured should in consequence become liable to pay, and should pay, any sum not exceeding the value of the vessel insured, the insurers undertook to pay to the insured such proportion of three-fourths of the sum so paid as their respective subscriptions bore to the value of the ship.

While so insured the defendants' ship came into collision with another ship. Both ships received damage, but the damage to the defendants' ship exceeded that to the other. Both ships were to blame, and the owners of the other ship paid to the defendants the difference between half the amount of the damage to the other ship and half the amount of the damage to the defendants' ship.

The defendants claimed to set off against a claim for money received to the plaintiffs' use a sum which was in their hands, on the ground that it was due to them as the plaintiffs' proportion of the damage done to the other ship in the collision, for which the defendants were liable, and which was not covered by the Lloyd's policy with running down clause attached:—

Held, that as half the amount of the damage to the other ship had not been paid over by the defendants to the owners of the other ship, but had only been allowed in account, by being deducted from the amount of half the damage to the defendants' ship, therefore half the amount of the damage to the other ship was not a sum which the defendants had become liable to pay, and had paid, within the meaning of the running down clause, and, therefore, was not recoverable by the defendants from the plaintiffs as loss or damage not covered by the Lloyd's policy with running down clause attached.

ACTION for money received.

Special Case.

The plaintiffs were a limited mutual marine insurance association, composed of several different classes or clubs. By Class I. "The London," the plaintiffs insured against the ordinary marine risks the hulls of the ships of the members of that class, and by Class V., "The Protecting," they undertook to indemnify the members of that class against (inter alia) "loss or damage to any other vessel . . . so far as such loss or damage is not covered by

the usual form of Lloyd's policies with the clause commonly known as the 'running down clause' attached." (1)

The defendant company was the owner of the steamship *Balnacraig*.

On December 10, 1886, the *Balnacraig* was insured in Class I., "The London," for 1000*l*., and was also entered in Class V., "The Protecting," of the plaintiff association in respect of a portion of her tonnage, and the defendant company was duly registered as a member of the plaintiff association in respect of such entries.

The following is the clause commonly known as the "running-down clause" referred to in the above mentioned rule of Class V., "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay and shall pay any sum or sums not exceeding the value of the said vessel hereby insured, we, the assurers, will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the said ship."

The *Balnacraig* was fully insured by policies in the usual form of Lloyd's policy with the said running down clause attached.

On December 10, 1886, and while the *Balnacraig* was entered as aforesaid in Class V., and was also insured as aforesaid, she came into collision with the steamship *Karo*, whereby both ships received damage, but the damage sustained by the *Balnacraig* largely exceeded that sustained by the *Karo*.

Both ships were to blame for the collision, and if there had been cross actions or claim and counter-claim by the owners of the respective vessels the decree which would have been pronounced by the Admiralty Division of the High Court of Justice on a finding or admission that both vessels were to blame would in the usual form have adjudged that the damage arising from the collision ought to be borne equally by the owners of both ships, and would have condemned the owners of the *Karo* in half the damage sustained by the *Balnacraig*, and the owners of the *Balnacraig* in half the damage sustained by the *Karo*. As a matter of fact the owners of the *Karo* paid to the defendants as

(1) Rules of Class V., rule 6, sub-s. (*b*).

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owners of the *Balnacraig* a sum equal to the difference between half of the amount of the damage sustained by the *Karo* and half the amount of the damage sustained by the *Balnacraig*, that being the sum for which the defendants as owners of the *Balnacraig* would have been entitled to issue a monition if a decree of the Admiralty Division had been obtained as aforesaid.

The defendants had in their hands 51*l.*, being moneys which they had received for the use of the plaintiffs. Before action brought the plaintiffs applied to the defendants to pay the said sum which the defendants declined to do, alleging that they were entitled to set off against the said sum a like sum of 51*l.* claimed to be due to the defendants from the plaintiffs in respect of the entry of the *Balnacraig* in Class V., as the proportion of the damage done to the *Karo* in the collision for which the defendants were liable, and which, as the defendants contended, was not covered by the policies on the *Balnacraig* with "running down clause" attached. The sum of 51*l.* so sought to be set off by the defendants was arrived at on the footing that the defendants became liable to pay half the damage of the *Karo*, and did pay that amount by deduction from half the amount of their own damage, that three-fourths of the sum so alleged to have been paid was recoverable by the defendants under the "running down clause" in their policies on ship, and that the remaining fourth was therefore recoverable from the plaintiffs under the indemnity provided by rule 6, sub-s. (*b*) of Class V. If this was the correct view of the rights of the parties, the plaintiffs admitted that 51*l.* was the correct measure of their liability to the defendants under the said indemnity, and that that sum was properly set off against the like sum belonging to the plaintiffs in the defendants' hands.

The plaintiffs, however, contended that inasmuch as the damage done to the *Balnacraig* in the collision exceeded the damage done to the *Karo*, the defendants as owners of the *Balnacraig* were not liable to pay, and did not pay anything to the owners of the *Karo*, and that the only liability arising out of the collision was a liability on the part of the owners of the *Karo* to pay to the defendants as owners of the *Balnacraig* one half of the difference between the amounts of the damage sustained by the two

ships respectively, and that consequently the plaintiffs were not liable to the defendants under the indemnity provided by the rules of Class V.

The question for the opinion of the Court was—

In the events which had happened were the plaintiffs liable under the indemnity provided by rule 6, sub-s. (*b*) of the rules of Class V. of the plaintiff association to pay the defendants any sum in respect of the damage to the *Karo* sustained in the collision.

If the Court should be of opinion that the plaintiffs were so liable, then judgment was to be entered for the defendants with costs.

If the Court should be of opinion that the plaintiffs were not so liable, then judgment was to be entered for the plaintiffs for 51*l.* with costs.

1889. Nov. 4, 5. The case was argued by *Cohen, Q.C.*, for the plaintiffs, and

Barnes, Q.C., for the defendants.

The arguments are fully stated in the judgment of the Court. *Sea Insurance Co.* v. *Hadden* (1), and *Stoomvart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (*The Khedive*) (2) were cited.

Cur. adv. vult.

Nov. 11. The judgment of the Court (Mathew and Wills, JJ.) was delivered by

MATHEW, J. The special case was so stated as to make it difficult to discover what the parties were disputing about; but it appears upon the argument that what was really in controversy was the mode of dealing correctly with a loss due to a collision of two ships, as between two sets of underwriters, viz., the members of a Mutual Insurance Association on the one hand and underwriters of Lloyd's on the other. As the difference arose out of a transaction of ordinary occurrence the case is one of general importance. We are indebted to the learned counsel on each side, who argued with equal ability, and apparently with equal confidence.

The action was brought to recover a sum of 51*l.* for which it

(1) 13 Q. B. D. 706. (2) 7 App. Cas. 795.

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was admitted the defendants are liable. The question in the case was whether a cross-claim for the same amount made by the defendants could be maintained.

The defendants were the owners of a steamship called the *Balnacraig* which they had insured at Lloyd's under a policy in the ordinary form with a collision clause annexed in the following terms:—

"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay and shall pay any sum or sums not exceeding the value of the said vessel hereby insured, we the assurers will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the said ship."

The liability to contribute one-fourth under this clause was insured by the defendants with the plaintiff association under the following rule.

"The risks, events, and occurrences under which members shall be entitled to protection are (inter alia) loss of or damage to any other vessel . . . or to any property on board such other vessel so far as such loss or damage is not covered by the usual form of Lloyd's policy with the clause commonly known as the running down clause attached."

The *Balnacraig* while covered by these insurances came into collision with the steamship *Karo*. Both vessels were to blame, and the loss, which in each case was for damage to ship only, had to be borne equally. The *Balnacraig* was damaged more than the *Karo*, and the loss was equalised between the two vessels in the usual way by the payment of a sum of money to the owners of the *Balnacraig* by the owners of the *Karo*.

The case for the plaintiffs was that the defendants had not become liable to pay any sum in respect of the collision, and therefore had no claim for an indemnity under their insurance with the plaintiffs.

The defendants on the other hand contended that they had become liable to contribute a sum of 51*l.* to the loss occasioned by the collision, and that the plaintiffs were bound to indemnify them to that amount.

Now it is quite clear that without the collision clause the underwriters on ship would not have been liable under any circumstances to bear any portion of the damage payable by the assured in consequence of a collision. This was settled by the case of *De Vaux* v. *Salvador*. (1) The clause came into existence in consequence of that decision. With such a clause where the ship insured is solely to blame the owner is entitled to call on his underwriters not merely to pay the cost of repairs, but also to bear three-fourths of his liability to the other ship. Where the insured ship is free from blame the owner is entitled to call upon his underwriters to repair, but the whole amount received for the damage done to the insured ship passes to them by subrogation.

It was contended for the plaintiffs that the same principle must apply where both vessels are in fault, and where a balance to equalise the loss is paid to the assured.

He is entitled, it was said, to call on his underwriters to repair the damage done to his ship, and must surrender to them any part of the balance paid him which may be applicable to the repairs of the vessel insured. But there is no need in such a case, where the assured receives and does not pay, to have recourse to the collision clause. And neither the insurers nor the insured become liable to pay or in fact pay anything. Again, if in order to balance the loss the assured had made a payment to the other shipowners he would upon this principle be entitled, in addition to the cost of repairs, to call on his underwriters to pay three-fourths of that amount and no more.

Accordingly the plaintiffs contended that in this case the defendants were under no liability to make any payment under their Lloyd's policy, and that they therefore had no claim under their insurance with the plaintiffs. The loss from the collision should be dealt with, it was said, on the footing of what was called in the argument a single liability, viz., the liability for any balance which the assured had to pay.

But the defendants on the other hand, acting, as they were entitled if not bound to do, in the interests of the underwriters on ship, insisted that they had become liable to contribute under

(1) 4 Ad. & E. 420.

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the collision clause and were therefore entitled to an indemnity from the plaintiffs. In other words the defendants contended that a proper adjustment of the case required a contribution from the plaintiffs' association to the defendants' underwriters at Lloyd's.

It was stated in support of this view that some average adjusters dealt with a loss like this upon the theory, as it was described, "of cross liabilities." And it was argued that this was the true principle. The claim against the insured ship was treated according to this system as if it were actually paid by her owner to the owner of the other vessel; and to that payment his underwriters under the collision clause thus became liable to contribute three-fourths, while the owner was bound to contribute one-fourth. The sum that the assured received from the other ship passed, it was said, by subrogation to his underwriters on ship. As the underwriters on ship and under the collision clause were the same persons, they in the result remained liable to pay three-fourths of the claim of the other ship for the collision while the owner or his underwriters paid the other one-fourth. Thus suppose each ship to be damaged to the extent of 1000*l.*, the underwriters under the collision clause would pay 750*l.*, and the owner 250*l.*, while in respect of the damage to ship the underwriters on ship would receive by subrogation as much as they had to pay.

As against this practice of settlement by the theory of cross liabilities it must be admitted that its application assumes that a payment is made which is not made in point of fact. It is not correct to say that the owner of the assured ship pays the damage done the owner of the other ship. He only does so on the condition that he is paid his claim by the other shipowner. Neither in fact nor in law is the owner of the assured ship liable to pay or entitled to receive more than the balance which equalises the loss (see *The Khedive*. (1))

This balance would therefore seem to be the amount upon which the collision clause was intended to operate, and it can only operate according to its terms in those cases where the assured has had to pay. To construe the collision clause to apply to anything else would be to substitute a far-fetched theory for

(1) 7 App. Cas. 795.

plain facts. The form of the clause seems to forbid any such construction. The words "become liable to pay, and shall pay," point to a real and not to some imaginary outlay.

But the supposed principle of adjustment by cross liabilities was sought to be supported by the argument that a settlement upon the footing contended for by the plaintiffs might in some cases lead to results which would be unjust and contrary to the true principles of insurance law. Cases were put where the damage to the ship insured was made up of claims for detention during repairs or loss of freight or damage to cargo.

It was said that the underwriters on ship ought not to receive by subrogation a balance arrived at after the allowance in account of such claims. This is quite clear, and was not disputed by the counsel for the plaintiffs. But it does not follow that the adjustment in this case as contended for by the plaintiffs is wrong, or that the theory of cross liabilities should be adopted in every case of collision.

There is however a view of the matter which seems to us to demonstrate that the plaintiffs are right in this case and that the theory of adjustment by cross liabilities is fallacious. The contention of the defendants seems to lead inevitably to this conclusion that the assured with a collision clause in his policy might incur a greater liability than if he had none. The clause was annexed to the ordinary policy, not to diminish, but to increase the protection afforded the assured, and any construction which made the assured liable for a loss which otherwise would have fallen on his underwriters would defeat the object with which the insurance in this form is effected. Let us suppose the case already put where the damage to each ship is the same amount, say 1000*l.* Where the policy contains no collision clause the underwriters on each ship would pay the cost of repairs, viz., 1000*l.* Now suppose the policy to contain a collision clause, and the claims to be adjusted on the footing of cross liabilities. The underwriters under the collision clause would have to pay three-fourths of the 1000*l.*, viz., 750*l.*, and the owner or his underwriter one-fourth, viz., 250*l.* The underwriters on ship would have to pay 1000*l.* for repairs of the assured ship, but they would receive by subrogation 1000*l.* from the other ship. In the result the

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owner would be liable for 250*l.*, and so to that extent worse off than if there were no collision clause in his policy.

Our judgment is that the defendants have not become liable to pay any sum in consequence of the collision within the meaning of the collision clause, and therefore that their defence cannot be maintained.

We give judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Parker, Garrett, & Parker.*
Solicitors for defendants: *Waltons, Bubb, & Johnson.*

P. B. H.

Oct. 31.

In re AN ARBITRATION BETWEEN THE LONDON, TILBURY AND SOUTHEND RAILWAY COMPANY, AND THE TRUSTEES OF THE GOWER'S WALK SCHOOLS.

Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 68—*Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 16—*Land injuriously affected—Obstruction of Lights—Compensation, Measure of—Damages recoverable in an Action.*

The claimant being the owner of certain buildings with ancient lights, pulled them down and erected a new building on their site. The position of certain portions of the windows of the new building coincided with that of portions of the old windows, while other portions of the new windows occupied wholly different positions. Before any right to the access of light to the non-coinciding portions of the new windows had been acquired, a railway company in the exercise of their powers erected a warehouse which obstructed the lights of windows in the new building:—

Held, that the claimant was entitled to compensation in respect of the whole of the windows so obstructed, including the windows and portions of windows which did not coincide with any of the ancient lights.

CASE stated by an arbitrator in an arbitration under the Lands Clauses Act.

The trustees of certain schools, situate in a street called Gower's Walk, and known as the Gower's Walk Schools, in 1884 removed to a new site in Lambeth Street, Whitechapel, upon which stood certain old buildings, the whole of the windows of which were ancient lights. They pulled the old buildings down and erected upon their site a schoolhouse, printing-house, and workshops.

Some of the window spaces in the new buildings did not cor-

respond in position with or include any of the ancient window spaces, while others included the whole or substantial parts of certain of the ancient windows, but were larger in area than such ancient windows.

In 1886, the London, Tilbury, and Southend Railway Company, in the exercise of the powers conferred upon them by their special Act (which incorporated the Railways Clauses and Lands Clauses Acts) erected on the opposite side of Lambeth Street a warehouse, which they raised to such a height as to obstruct certain of the light of the trustees' new buildings.

The trustees claimed compensation in respect of the whole of the windows so obstructed, including windows and portions of windows which did not coincide with any of the old lights. (1) The company on the other hand contended that they were liable to pay compensation only in respect of damage to the coinciding portions.

The arbitrator assessed the compensation at £1450 if the claimants were entitled to have it assessed on the former basis, and at £725 if they were only entitled to have it assessed on the latter. The question for the opinion of the Court was, which basis of assessment was correct.

Bosanquet, Q.C. (*Houghton*, with him), for the claimants. According to the authority of *Newson* v. *Pender* (2) and *Scott* v. *Pape* (3) the claimants have a legal right to the access of light to those portions of the new windows which coincide with the old; though it is conceded that there their legal right stops, and that in an action for damages for obstruction of light they could not recover except in respect of the damage to the coinciding portions. But the measure of their right to damages in an

(1) At the hearing before the arbitrator the trustees claimed in the alternative to have the compensation assessed on the basis of the value of the light which formerly came to the old window spaces (portions of which were blocked out in the new building) on the assumption that they had not abandoned the old lights, and that it was competent for them to re-open the portion so blocked out if they were minded to do so; and the arbitrator assessed the compensation payable on this basis also at the sum of £1450. But on the argument before the Court the trustees abandoned this basis of compensation.

(2) 27 Ch. D. 43.

(3) 31 Ch. D. 554.

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action is not the measure of their right to compensation. The land of the company being separated from the claimant's buildings by the width of the street, it was impossible for the company to obstruct the portions of the windows which were not entitled to the access of light without also obstructing the portions which were so entitled, and under those circumstances, if they had attempted to obstruct the windows without statutory authority, the claimants could have obtained an injunction to restrain them from so doing. It was therefore under their statutory powers alone that the company erected their warehouse to the height to which they did. Those powers are contained in s. 16 of the Railways Clauses Act by which section it is provided that the company are to make full satisfaction for all damage sustained by reason of the exercise of the powers, by which is meant that the party injured, if entitled to compensation at all, is entitled to recover for all his damage whether legal or not. And in this respect no distinction is to be drawn between a case in which the claim to compensation is based on the fact of land having been taken, and one in which it is based on a disturbance of an easement. Sect. 6 of the Railways Clauses Act treats both classes of cases as standing on the same footing. And a long series of decisions, of which *Buccleuch* v. *Metropolitan Board of Works* (1) and *Cowper-Essex* v. *Local Board for Acton* (2) are instances, have established that where land is taken the claimant is entitled to be placed in the same position pecuniarily as though the statutory powers had never been exercised.

R. S. Wright, (*C. Haigh*, with him), for the company. The principle relied on has never yet been applied to a case in which no land has been taken. It has no application to a case in which the only right to compensation is that arising from an injurious affection of land. In *Buccleuch* v. *Metropolitan Board of Works* Lord Chelmsford expressly points out (3) that even assuming that the claimant had only an easement over the causeway which was there taken, still the deprivation of that easement amounted to a taking of land, for by the Thames Embankment Act the word "lands" was to include "easements."

(1) Law Rep. 5 H. L. 418. (2) 14 App. Cas. 153.
(3) Law Rep. 5 H. L. at p. 459.

MATHEW, J. In my opinion the claimants in this case are entitled to the sum of 1450*l*. The position of things appears to be this: The building now occupied by the school, which is a new building, contains some windows corresponding in position with the windows of the old building; it also contains a number of additional windows which do not so correspond, and in respect of which it is clear that the owners of the school had no legal right to the access of light. The railway company in the exercise of its powers erected a warehouse which had the effect of darkening the windows of the school.

The result of that was that the easement, undoubtedly possessed by those of the windows of the school which took the precise place of the old windows, was destroyed or materially injured, and the question for us is whether the destruction of that easement lets in the entire claim for damage to the schools in consequence of the exercise by the company of the powers conferred on them by the Act of Parliament. It appears to me that, having regard to the language of the Act, that claim is let in. It is only necessary to refer to s. 16 of the Railways Clauses Act, under the authority of which this warehouse was erected, to make it clear that the legislature so intended; because the language of the section is this, "that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for *all damage* by them sustained by reason of the exercise of such powers." What, then, is the damage which the school trustees have sustained here? obviously a depreciation of their property, which might never have taken place if the company had not exercised their powers. And their property has, according to the finding of the arbitrator, been thus depreciated to the extent of 1450*l*.

There are numerous authorities upon the construction of this section, and also of s. 6 of the same Act, and s. 68 of the Lands Clauses Act, all of which sections are in pari materiâ; and in all the cases, if I understand them correctly, from *In re Stockport, &c., Ry. Co.* (1) down to the last case in the House of Lords, the

(1) 33 L. J. (Q.B.) 251.

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case of *Cowper-Essex* v. *Local Board of Acton* (1), the principle is recognised that when once a legal right of a claimant has been interfered with by the exercise of the powers conferred on the company, whether the right so interfered with was a right to the possession of land or a right to an easement, all the damage done to him as the consequence of that interference is the subject of compensation.

WILLS, J. I am of the same opinion. It seems that the structure erected by the railway company has obstructed the access of light to a number of new windows which are entitled to no legal protection, but it has also obstructed a certain number of other windows which are admittedly entitled to protection as ancient lights. And the question which the arbitrator submits to us is this: Under such circumstances as these are the claimants confined to the legal damage which they would have been entitled to claim against the company in an action, had the company not been acting under statutory powers, or are they entitled to all the damage which they have actually sustained by reason of the construction of this warehouse? To my mind the question so stated answers itself. Sect. 6 of the Railways Clauses Act provides, "with respect to the construction of the railway and the works connected therewith," that "in exercising the power given to the company by the special Act . . . the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, *or injuriously affected by the construction thereof*, full compensation . . . for *all damage* sustained . . . by reason of the exercise of the powers . . . vested in the company."

The authorities, which run in a clear and even channel, establish beyond dispute that the word "damage" there means the real loss which the claimant has sustained by reason of the construction of some work which could not have been constructed without the statutory authority, and is not limited to the damage which would be recoverable against a person constructing a similar work without statutory powers.

To put it in another way. The party injured by the construc-

(1) 14 App. Cas. 153.

tion of the works would, but for the statutory powers, be entitled to an injunction, which would prevent the works from being constructed altogether. Then the intention of the Act, as I understand it, is that the injured party shall, so far as money can do it, be put in the same position as if he had had that injunction, and as if things had been preserved in statu quo.

Order accordingly.

Solicitors for claimants: *Hanbury, Hutton, & Whitting.*
Solicitors for company: *Mathews & Browne.*

J. F. C.

CARNEGIE *v.* CONNER.

Oct. 25.

Ship—Charterparty—Construction of Guarantee as to Ship's Capacity.

A charterparty, which provided that the ship should "load a cargo of creosoted sleepers and timbers," contained the following clauses: "Charterer has option of shipping 100/200 tons of general cargo;" and "Owners guarantee ship to carry at least about 90,000 cubic feet or 1500 tons dead weight of cargo":—

Held, that the latter clause did not amount to a warranty that the ship should be able to carry about 90,000 cubic feet of the description of cargo which the charterer was under the previous clauses entitled to tender, but was merely a warranty of the carrying capacity of the ship.

APPEAL from the Mayor's Court.

The action was by the charterer of a ship against the owner to recover damages for breach of a warranty contained in the charterparty. It was provided by the charterparty that the ship on her arriving at her loading berth should "load a cargo of creosoted sleepers and timbers," the freight to be a lump sum of 1000*l.*; and it contained the following clauses: "Charterer has option of shipping 100/200 tons of general cargo;" and "Owners guarantee ship to carry at least about 90,000 cubic feet or 1500 tons dead weight of cargo."

The plaintiff tendered a cargo of 1500 tons dead weight, consisting partly of general cargo (not exceeding 200 tons), and the residue consisting of creosoted sleepers and timbers.

The actual cubical measurement of the cargo so tendered did not exceed 90,000 cubic feet. But owing to the peculiar nature

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of the cargo, the sleepers being of unequal lengths, and many of them being half rounds, its stowage involved a great waste of space in the ship's hold, the result of which was that when 64,400 cubic feet, or 1120 tons of dead weight, had been put aboard the ship was full, and could load no more. The plaintiff was accordingly obliged to send the balance of the goods tendered, amounting to 380 tons, by another ship, and brought this action to recover from the defendant the expenses which he had thereby incurred.

At the trial, before the Recorder of the city of London and a jury, the defendant tendered evidence to shew that the ship had a carrying capacity of the amounts guaranteed, but the Recorder refused to admit such evidence, and directed the jury that the charterparty amounted to a guarantee that the ship could and should carry 90,000 cubic feet, or 1500 tons dead weight of the kind of cargo which was specified in the charterparty. Upon that direction the jury found a verdict for the plaintiff.

The defendant accordingly moved the Divisional Court to enter judgment for him, or for a new trial, on the grounds of misdirection and non-reception of evidence.

Bucknill, Q.C. (*E. Hume Williams*, with him), for the defendant. The warranty sued upon was nothing more than a guarantee of the carrying capacity of the ship—that is to say, it was an undertaking that the ship should be able to carry up to the amount specified, not *the* cargo named, but *a* cargo of the most favourable description—one the stowage of which involved no waste of space by reason of interstices between the packages,—and the defendant had evidence that according to that construction the ship satisfied the warranty. If the Recorder's construction of the charterparty was correct, it was open to the plaintiff to tender sleepers or timbers of any shape or size he chose, and a general cargo (up to the limit mentioned) of as bulky a description as he pleased. But it cannot be presumed that the shipowner intended so to place himself at the mercy of the charterer.

Wheeler, Q.C. (*Palmer*, with him), for the plaintiff. The guarantee must be read with the earlier clause of the charter-

party specifying the nature of the cargo which the ship was to load, and amounts to a warranty that the ship shall carry the quantity specified of the particular kind of cargo which the parties had in contemplation as the cargo to be carried. The shipowner knows better than the charterer does what his ship will carry, and accordingly the charterer, having a particular quantity of cargo to be carried, requires that the shipowner shall warrant his ship to be capable of carrying that quantity. The defendant knew that the stowage of sleepers would involve a certain waste of space, and he should have allowed a sufficient margin to meet that waste. *Morris* v. *Levison* (1) supports the plaintiff's contention. There the contract was that the ship should load "a full and complete cargo of iron ore, say about 1100 tons," and it was held that the words "about 1100 tons" overrode the words "full and complete cargo," and that accordingly, the shipowner having provided a ship which could carry 1210 tons, the charterer was under no obligation to fill the ship, but satisfied his contract by loading about 1100 tons.

HUDDLESTON, B. It seems quite clear to my mind that there has been a miscarriage in this case, and therefore it must go down for a new trial. The verdict proceeded upon the direction of the learned Recorder that the guarantee in the charterparty was a guarantee that the ship would carry 90,000 cubic feet of sleepers, timbers, and general cargo. I do not think that the clause can be so interpreted. As I read it, it was nothing more than a contract that the cubical contents of the space in the ship's hold available for the stowage of cargo were not less than about 90,000 cubic feet, and that 1500 tons dead weight were capable of being put on board without sinking the ship below the proper depth. *Morris* v. *Levison* (1), which has been cited, is altogether different from the present case. There the contract being to load a full and complete cargo, the parties agreed that 1100 tons should be considered to be a full and complete cargo, irrespective of the size of the ship provided. Here the guarantee is merely as to the carrying capacity of the vessel.

(1) 1 C. P. D. 155.

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MATHEW, J. I am of the same opinion. I do not think that there is any indication in this charterparty of an intention to guarantee that the ship shall carry the cargo specified in the charterparty to the amount there mentioned. The evidence which was tendered by the defendant that this ship was of an actual carrying capacity of 90,000 cubic feet, or 1500 tons, and which was objected to, appears to me to have been perfectly relevant to the issue, and ought to have been received. The learned Recorder excluded that evidence, and informed the jury that the ship was bound to carry 380 tons more than she could possibly hold. The interpretation so put upon the contract seems to me, with deference, to be wholly unreasonable; and I think it altogether incredible that any shipowner would have or could have been understood to have entered into such a contract.

Order for a new trial.

Solicitor for plaintiff: *Kenneth Powles.*
Solicitors for defendant: *Lowless & Co.*

J. F. C.

Oct. 29.

BAZETT *v.* MORGAN.

Practice—Costs—Appeal—Discretion—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

Sect. 116 of the County Courts Act, 1888, gives the Court or a judge a discretion to allow costs on the High Court scale in actions brought in the High Court and founded on contract, in which the plaintiff has recovered a sum of 20*l.* or upwards, but less than 50*l.*; so that by virtue of s. 49 of the Judicature Act, 1873, no appeal lies from an order allowing such costs.

APPEAL from an order made at chambers by Wills, J.

The writ of summons in the action was issued on February 12, 1889, and specially indorsed under Order III., r. 6, with a claim for 49*l.* 10*s.* for board and tuition supplied by the plaintiff to the defendant's son.

On April 11 the plaintiff obtained an order, under Order XIV., allowing him to sign final judgment for 23*l.* 15*s.*, part of the claim, with liberty to the defendant to defend as to the remainder.

The remainder of the claim was subsequently abandoned under an order of the Court made on June 15.

On July 15 Wills, J., made an order "that the plaintiff be allowed the costs of this action upon the scale in use in the Supreme Court."

The defendant appealed.

Morton Smith, for the plaintiff. There is a preliminary objection to this appeal.

It was within the judge's discretion to allow costs on the High Court scale under s. 116 of the County Courts Act, 1888. (1) The appeal, therefore, is an appeal "as to costs only which by law are left to the discretion of the Court" within the meaning of s. 49 of the Judicature Act, 1873, which prohibits any appeal in such cases. The words occurring in s. 116 of the County Courts Act, 1888, "unless in any such action the High Court or a judge thereof at chambers shall by order allow costs," refer to both kinds of actions on contract mentioned in sub-s. 1, namely, where the plaintiff recovers less than 20*l.*, and where he recovers 20*l.* or upwards, but less than 50*l.* In the second alternative the plaintiff is entitled to his costs on the county court scale without

(1) "With respect to any action brought in the High Court which could have been commenced in a county court, the following provisions shall apply:—

"1. If in an action founded on contract the plaintiff shall recover a sum less than twenty pounds, he shall not be entitled to any costs of the action, and if he shall recover a sum of twenty pounds or upwards, but less than fifty pounds, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court; and

"2. If in an action founded on tort the plaintiff shall recover a sum less than ten pounds, he shall not be entitled to any costs of the action; and, if he shall recover a sum of ten pounds or upwards, but less than twenty pounds, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court; unless in any such action, whether founded on contract or on tort, a judge of the High Court certifies that there was sufficient reason for bringing the action in that court, or unless the High Court or a judge thereof at chambers shall by order allow costs. Provided that, if in any action founded on contract the plaintiff shall within twenty-one days after the service of the writ, or within such further time as may be ordered by the High Court or a judge thereof, obtain an order under Order XIV. of the Rules of the Supreme Court empowering him to enter judgment for a sum of twenty pounds or upwards, he shall be entitled to costs according to the scale for the time being in use in the Supreme Court."

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any order. The words "may allow" must, therefore, give the judge at chambers a discretion to allow some additional costs, and, as there are only two scales provided, there must be a discretion to allow them on the High Court scale.

Lincoln Read, for the defendant. The order appealed from was made without jurisdiction, and an appeal will lie from it. The first proviso in sub-s. 2 of s. 116 refers only to actions founded on contract in which the plaintiff recovers less than 20*l.*, and actions founded on tort in which he recovers less than 10*l.* The section gives no discretion where 20*l.* and upwards is recovered in actions founded on contract, or where upwards of 10*l.* is recovered in actions founded on tort. The words "may allow costs" apply only where the plaintiff would be entitled to no costs at all without an order. The words "in any such action" refer only to the actions mentioned first in sub-ss. 1 and 2.

[MANISTY, J., referred to *Neaves* v. *Spooner*. (1)]

Next, it is contended that the 2nd sub-section does not apply to this case. It only applies where the action has gone to trial and judgment has been recovered. The legislature intended, as is shewn by the proviso at the end of s. 116 (which deals with judgments obtained under Order XIV. within twenty-one days of service of the writ), to put a premium on being prompt.

FIELD, J. This question arises out of new legislation, and occasions some difficulty in determining how to deal with it. After full consideration, I think we must decide now the question whether or not the judge at chambers had a discretion to allow the plaintiff his costs on the High Court scale.

The plaintiff has brought an action founded on contract, and has recovered in that action more than 20*l.* and less than 50*l.* Although in the course of the action he applied for an order under Order XIV., no order was obtained until after the expiration of twenty-one days from the service of the writ of summons, so that it is not necessary to decide anything with respect to the effect of the proviso at the end of s. 116, sub-s. 2 of the County Courts Act, 1888. The order, in fact, was not obtained within the twenty-one days specified by the proviso. It does not appear

(1) 58 L. T. 164; 36 W. R. 257.

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Field, J.

whether any order extending the time was made, and it is unnecessary to decide whether the proviso applies, because the contention of the plaintiff's counsel was that the case fell within the earlier part of the section. Now, sub-s. 2 of s. 116 is certainly awkwardly and inconveniently drawn, because the provision in question, which is found in the middle of sub-s. 2, is grafted upon the preceding provisions of the two sub-sections, which relate to an action of contract in which the plaintiff recovers less than 20*l.*, an action of contract in which he recovers more than 20*l.* and less than 50*l.*, and to actions of tort. The words are, "unless in any such action, whether founded on contract or on tort . . . . a judge at chambers shall by order allow costs." In other words it is: "Unless in any action founded on contract in which the plaintiff recovers more than 20*l.* and less than 50*l.* the judge shall by order allow costs." The plaintiff's counsel took the preliminary objection that it was within the judge's discretion to allow costs on the High Court scale, and therefore, under s. 49 of the Judicature Act, 1873, no appeal would lie from his decision. Sect. 49 in very clear terms provides that no order made by the High Court or a judge thereof "as to costs only which by law are left to the discretion of the Court" shall be subject to any appeal, except with leave. The question we have to decide, therefore, is whether or not these costs are "costs only, which by law are left to the discretion of the Court." Now, the costs in question are the costs of an action founded on contract in which the plaintiff has recovered more than 20*l.* and less than 50*l.* It is contended that they were in the discretion of the judge because the words in sub-s. 2, "allow costs," enable the judge, not only to allow costs "eo nomine," but to say upon which scale the costs shall be. During the argument my brother Manisty referred to the case of *Neaves* v. *Spooner* (1), in which the Court of Appeal, reversing the decision of the Divisional Court, held that, under s. 5 of the County Courts Act, 1867, the judge had a discretion to give costs on the county court scale, and was not bound to give them on the High Court scale. That was a decision upon similar words to those in question in this case, and it is, I think, an authority for saying

(1) 58 L. T. 164; 36 W. R. 257.

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that the words "allow costs," occurring in s. 116 of the County Courts Act, 1888, give the judge a discretion to allow them on the High Court scale. The learned judge in chambers has exercised that discretion, and no appeal lies against his decision.

MANISTY, J. I think that the meaning of s. 116 of the County Courts Act, 1888, is clear, although the section is clumsily drawn. Sub-s. 1 is perfectly clear. If in an action founded on contract the plaintiff recovers a sum less than 20*l.*, he is not entitled to any costs; if he recovers a sum of 20*l.* or upwards, but less than 50*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in the county court. Then sub-s. 2 takes up an action founded on tort, and deals with it in the same way as sub-s. 1 has dealt with an action founded on contract. If in an action founded on tort the plaintiff recovers a sum less than 10*l.* he shall not be entitled to costs; if he recovers a sum of 10*l.* or upwards, but less than 20*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in the county court. The section up to that point is perfectly plain and distinct. The first sub-section has dealt with actions founded on contract; the second with actions founded on tort. Then come the words, "unless in any such action, whether founded on contract or on tort, a judge of the High Court certifies that there were sufficient reasons for bringing the action in that Court, or unless the High Court or a judge thereof at chambers shall by order allow costs." If instead of the word "unless" the words "provided always" had been used, the matter would, I think, have been quite clear, because a proviso immediately following the enactment in the two sub-sections would obviously have applied to both. What costs are they which the judge "may allow in any such action"—that is, in any action founded on contract which is dealt with by sub-s. 1? First, he may allow costs where otherwise there would be none—that is, where the plaintiff has recovered less than 20*l.*; secondly, he may allow costs where the plaintiff has recovered 20*l.* or upwards, but less than 50*l.*, and is, therefore, unless he obtains an order from the Court or a judge, only entitled to costs on the county court scale.

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Manisty, J.

I am of opinion that the costs which the judge may allow in the second case are such costs as he thinks fit. *Neaves* v. *Spooner* (1) is an authority for that. If he thinks fit he may allow costs on the High Court scale. The last proviso in s. 116 seems to me to reconcile all the provisions of the section and to make their meaning clear, because it provides that where the plaintiff in an action founded on contract, within twenty-one days from the service of the writ obtains an order, under Order XIV., enabling him to enter judgment for a sum of 20*l.* or upwards, he "shall" be entitled to costs on the High Court scale. There no discretion at all is given, and the language of the proviso throws light upon the meaning of what has gone before, where it was intended that a discretion should be exercised.

I am, therefore, of opinion that the order appealed from was rightly made, within the discretion of the judge, and that no appeal lies against it.

Appeal dismissed.

Solicitors for plaintiff: *Pitman & Sons, for A. C. Bazett, Newbury.*

Solicitor for defendant: *T. Durant.*

W. A.

[IN THE COURT OF APPEAL.]

Nov. 13.

PRAED *v.* GRAHAM.

Practice—New Trial—Excessive Damages—Action for Libel.

Where the plaintiff has obtained a verdict in an action for libel, the Court will not grant a new trial on the ground of excessive damages, unless they think that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably have given them.

In assessing damages the jury are entitled to take into consideration the whole conduct of the defendant in the matter from the time the libel was published down to the time their verdict is given.

APPEAL from a decision of the Queen's Bench Division.

In an action to recover damages for a libel contained in a letter written by the defendant to the plaintiff's wife, the jury gave a verdict for the plaintiff and assessed the damages at 500*l.*

(1) 58 L. T. 164; 36 W. R. 257.

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The defendant having moved for a new trial on the ground (inter alia) that the damages were excessive, the Queen's Bench Division dismissed the motion.

The defendant appealed.

Fillan, for the appellant, contended (inter alia) that the damages were so excessive as to come within the definition which Palles, C.B., in *M'Grath* v. *Bourne* (1), said had been stated by Fitzgerald, J., namely, that in order to justify the Court in granting a new trial on the ground of excessive damages, "the amount should be such that no reasonable proportion exists between it and the circumstances of the case."

Lockwood, Q.C. (*Atherley Jones*, with him), was asked to argue the question of damages only.

The older authorities shew that the Court will not grant a new trial unless they can trace out some misconduct, or gross error, or misconception, on the part of the jury in assessing the damages: see Mayne on Damages, 4th Ed., p. 553, and the cases there collected. There is nothing to shew any such misconduct or error in the present case. If the true definition be that the amount must be so large that no jury could reasonably have arrived at it, the amount in this case, having regard to all the circumstances, does not satisfy that definition. It certainly seems reasonable that, with respect to granting a new trial on the ground of excessive damages, the Court should act upon the same rule as is applied when a new trial is asked for on the ground that the verdict is against the weight of evidence. The jury were entitled to consider the defendant's whole conduct in the matter from the time the libel was published down to and at the trial, and to assess the damages accordingly.

Fillan, replied.

LORD ESHER, M.R. In this case two questions of law have been discussed which I desire to notice. The first question is, what is the rule of conduct which should be followed by the Court —either a Divisional Court or the Court of Appeal—to which an application is made in such an action as an action for a libel to

(1) 10 Ir. Rep. C. L. (Ex.) 160.

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set aside the verdict on the ground that the damages given by the jury are excessive? I think that the rule of conduct is as nearly as possible the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the Court, having fully considered the whole of the circumstances of the case, come to this conclusion only:—"We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them," then they ought not to interfere with the verdict. If, on the other hand, the Court thinks that, having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them, then they ought to interfere with the verdict. If the authorities are looked at that will be found to be the rule of conduct which the judges have adopted. If the Court can see that the jury in assessing damages have been guilty of misconduct, or made some gross blunder, or have been misled by the speeches of the counsel, those are undoubtedly sufficient grounds for interfering with the verdict, but they come within the larger rule of conduct which I have laid down, and are grounds which are included in that rule. I think that the proposition said to have been stated by Fitzgerald, J., is equivalent to the one I have stated.

I desire also to say that in actions of libel there is another rule, which is this:—the jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial. [His Lordship then proceeded to deal with the facts of the case, and came to the conclusion that the jury might, not unreasonably, have given the damages which they gave.]

LINDLEY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant: *White & De Buriatte.*
Solicitor for the respondent: *W. Bohm.*

W. A.

1889
Nov. 27.

[IN THE COURT OF APPEAL.]

THE ATTORNEY-GENERAL *v.* EMERSON AND OTHERS.

Practice—Costs—Appeal—Stay of Proceedings—Discretion—Order LVIII., *r.* 16.

Order LVIII., r. 16, gives the Court against whose decision an appeal is pending a discretion to refuse the appellant a stay of proceedings; and no practice binding on the Courts has, or can be, established to the effect that the Court will only refuse a stay of proceedings as to costs upon the terms that the respondent's solicitor shall give an undertaking to repay, in the event of the appeal being successful, the costs paid to him by the appellant.

ORIGINAL MOTION.

An information by the Attorney-General was preferred against the defendants to try the right, as between the Crown and the defendants, to the Maplin Sands, over which certain rights were claimed by the defendants as owners of an adjoining manor in the county of Essex.

The information was tried in 1887 by a Court of the Queen's Bench Division, who gave judgment for the Crown.

The defendants appealed, and in December, 1888, the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) reversed the decision of the Queen's Bench Division, and gave judgment for the defendants, with costs in the Court of Appeal and the Court below, and refused to stay execution pending an appeal to the House of Lords.

Part of those costs were accordingly paid by the Crown to the defendants, but a sum of £2400 in respect of the costs was still unpaid.

This motion was now made, on behalf of the Crown, for an order directing the defendants' solicitor, if the costs still unpaid were paid to him, to give an undertaking to repay them to the Crown in the event of the appeal being successful.

It appeared that one of the defendants was in such circumstances as to make it improbable that he would be able to pay any costs if the appeal succeeded.

Sir R. E. Webster, A.G., (*Ingle Joyce*, with him), for the Crown. The decisions of the Courts have established as an invariable

practice that, where the appeal is not frivolous, the Court will only refuse to stay proceedings as to costs upon the condition that the respondent's solicitor shall give an undertaking to repay, if the appeal is successful, the costs paid to him: *Merry* v. *Nickalls* (1); *Morgan* v. *Elford* (2); *Wilson* v. *Church* (3); *Ashbee* v. *Appleby* (4); *Eames* v. *Hacon* (5). The Courts have acted upon the view that, when the judgment which is to be appealed from has once been obtained, the solicitor gets his costs from the unsuccessful party. Before that he had to rely upon his retainer only. The order asked for is a reasonable one. There is no case reported in which it has been refused where the appeal was bonâ fide. The undertaking required from the solicitor is always termed the "usual undertaking," and for a long time has been imposed by the Court as a matter of course when the Court refused to stay proceedings. At any rate the order is a just one to make under the special circumstances of this case.

Stuart Moore, for the defendants. The Court has a discretion to refuse a stay of proceedings without imposing the condition that the defendants' solicitor shall give the required undertaking. There are no special circumstances in this case which should induce this Court to alter the decision they arrived at when the same application was made at the hearing before them.

Sir R. E. Webster, A.-G., replied.

LORD ESHER, M.R. In this case an application is made that the solicitor acting for the respondents in an appeal from the judgment of this Court may be ordered to give an undertaking to repay the costs paid to him, in the event of the appeal succeeding. The application must be made under Order LVIII., r. 16. It must, therefore, be an application for an order to stay proceedings as to costs unless the solicitor will give the undertaking which is asked for. The first question is, whether or not there has arisen a practice, which has become invariable, that the Court will in every case, whether there are particular circumstances in the case or not, make an order to stay proceedings pending an appeal unless the respondent's solicitor gives the

(1) Law Rep. 8 Ch. 205.
(2) 4 Ch. D. 388.
(3) 12 Ch. D. 454.
(4) W. N. 1878, p. 20.
(5) W. N. 1881, p. 4.

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ATTORNEY-GENERAL v. EMERSON.

Lord Esher, M.R.

undertaking. Cases have been cited in which the order has been made, and expressions used which, it is said, shew that the Courts have laid down as a rule to guide them this practice, which so has become an established practice. Now expressions used in cases decided before rule 16 was drawn up, are, to my mind, quite immaterial; as soon as the rule was made the Court could not look beyond it. As to expressions used in cases decided since the rule was drawn up, they are casual expressions, and are not meant, I think, to convey what it is said they do convey. The real question is, what is the construction of this rule? It says: "An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct." In all the rules the word "may" has been held to mean "may or may not." It has been held to give a discretion, which is called a judicial discretion, but is still a discretion. If the practice contended for be established, in my opinion it alters the effect of the rule. It takes away the discretion to refuse a stay of execution, by imposing a particular term as a condition of the refusal in all cases. The Courts have no power to alter the effect of the rule; no authority to establish any practice in conflict with the rule, and no power to say that it shall be binding upon the Courts. I decline to take any other view than that the Court has a discretion in each case. It is said that the cases shew that the Courts have frequently made the order asked for here, and there is no reported case to the contrary. Whether there be any reported case to the contrary or not, I feel certain that this Court has over and over again refused to say there was any established practice, but has said that it would exercise its discretion in each case. I cannot, therefore, accept the view which the Attorney-General urged upon us. I believe that rule 16 was made in the terms in which it is upon a consideration of the rights of the solicitor, and his position in regard to his lien for costs against his client, and in order to get rid of the rule which formerly prevailed that a rule nisi in all cases operated as a stay of execution.

With respect to the particular circumstances of this case; a large sum of money has now to be paid by the Crown to the defendants through their solicitor. The Crown has appealed from our judgment to the House of Lords. If they succeed in that appeal they would have the right to get back the costs from the defendants. They ought, in my opinion, to have the security of both defendants in respect of the repayment of costs, but as to one defendant it is established to our satisfaction that there is great danger that they would not recover any costs from him. Under those circumstances it appears to me not unjust to make an order, under rule 16, that with respect to those costs which have not yet been paid to the defendants, proceedings shall be stayed unless the defendants' solicitor gives his undertaking to repay them if the appeal succeeds.

LINDLEY, L.J. I am of the same opinion. I must protest against the notion that any Court has a right to lay down a rule which shall limit the discretion given by Order LVIII., r. 16. The Court must decide upon the particular facts of each case. It is not competent for any Court or judge to lay down a rule which shall limit the exercise of that discretion. I am aware that it has been done—one can see that it saves a judge trouble, if he can satisfy himself that such a practice exists—but it has not been rightly done. In this case there are circumstances upon which, exercising our discretion under rule 16, we can make the order asked for.

LOPES, L.J. This is an application under Order LVIII., r. 16. The true interpretation of that rule is clear. It confers a discretion upon the Court or judge asked to make an order such as is asked for in this case. It would be interfering with and limiting that discretion if we held that it was an established practice in every case to make the order. As to this particular case, there are special circumstances which justify us in granting the application.

Motion granted.

Solicitor for the Crown: *The Solicitor to the Treasury.*
Solicitor for the defendants: *F. E. Goodhart.*

W. A.

1889
Dec. 3.

THE QUEEN *v.* COWPER.

County Court—Practice—Costs—Plaint entered by Solicitor—Signature of Particulars—County Court Rules, 1889, *Order* VI., *r.* 10, *and Appendix.*

In order to entitle the plaintiff in an action in a county court to the costs of entering a plaint by a solicitor, the solicitor must sign the particulars, and a lithographed statement of the solicitor's name on the particulars is insufficient.

A RULE NISI had been granted calling upon Fitzroy Cowper, Esq., the deputy judge of the county court at Croydon, to shew cause why he should not hear and determine a question arising in an action brought in that court. By the particulars in the action 2*l.* 16*s.* 5*d.* was claimed for debt, 4*s.* for court fees, and 4*s.* for solicitors' costs. The particulars were drawn on a form which contained the name of the plaintiff's solicitors lithographed. The day before the hearing the defendant paid into court 3*l.* 0*s.* 5*d.* At the hearing the registrar ruled that the plaintiff's solicitors were not entitled to an order for payment of the 4*s.* claimed as solicitors' costs, on the ground that the plaintiff's solicitors had not complied with the rules by signing the particulars. (1) The matter was referred to the deputy judge, and he upheld the registrar's ruling, and disallowed the claim.

Jelf, Q.C., and *M. J. Muir Mackenzie*, for the deputy judge.

Crump, Q.C. (*E. Lewis Thomas*, with him), for the plaintiff,

(1) By the County Court Rules, 1889, Order VI., r. 10: "The solicitor of a plaintiff suing by a solicitor shall indorse on the particulars his name or firm, and place of business, and shall state thereon where he will accept service of proceedings in the action or matter on behalf of the plaintiff, otherwise the costs of entering the plaint by the solicitor shall not be allowed."

The Appendix to the Rules contains the following provision as to costs:—

"Costs to be paid to solicitors in actions and matters, as well between party and party as between solicitor and client, where the amount recovered exceeds 2*l.* and does not exceed 10*l.*

"*Lower Scale.*

"Where the particulars and copies are signed by a solicitor, and the amount claimed exceeds 2*l.* and does not exceed 5*l.*, there may be entered upon an ordinary summons and upon a default summons four shillings, unless the latter is to be served by a solicitor, when seven shillings shall be entered."

took a preliminary objection. The judge is not entitled to appear and shew cause against the rule. In *Reg.* v. *Judge of the Marylebone County Court* (1), where the rule was discharged, the Court refused to allow the judge's costs. Day, J., said in that case: "It is not usual for the judge to be represented by counsel in such applications as the present, unless the whole jurisdiction of his Court is in question, as in the recent case of the learned judge of the Court of Arches: *Mackonochie* v. *Lord Penzance*." (2)

MATHEW, J. The rule is addressed to the deputy judge. The case is not like that of justices, who can make an affidavit. (3)

LORD COLERIDGE, C.J. The words quoted shew that the judge may appear. The objection must be overruled.

MATHEW, J. We do not decide that the judge must appear; only that he may.

Jelf, Q.C., shewed cause. According to the true construction of the County Court Rules, which must be read together with the Appendix, actual signature of the particulars by the solicitor is necessary, and the lithographed statement of the name is insufficient.

[He referred to *Jonas* v. *Long*. (4)]

Crump, Q.C., in support of the rule. The word used in Order VI., r. 10, is "indorse," which shews that signature in the strict sense of the word is unnecessary; but even if signature is required this is a sufficient signature.

In *Lobb* v. *Stanley* (5) a case arising on a Bankruptcy Act (6 Geo. 4, c. 16, s. 131), Patteson, J., said: "The object of all the statutes is merely to authenticate the genuineness of the document." That object is effected by the process employed here. In *Bennett* v. *Brumfitt* (6), where the statute (6 & 7 Vict. c. 18, s. 17) required that the notice should be "signed by the person objecting," a signature by a stamp was held sufficient, and Willes, J., said, "The using a stamp is only a compendious way of writing the party's name." This would be a good signa-

(1) 50 L. T. (N.S.) 97.
(2) 6 App. Cas. 424.
(3) By 35 & 36 Vict. c. 26.
(4) 20 Q. B. D. 564.
(5) 5 Q. B. 574.
(6) Law Rep. 3 C. P. 28.

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ture of a will or of a document required by the Statute of Frauds to be signed.

LORD COLERIDGE, C.J. I yield to this objection with great reluctance. If Order VI., r. 10, stood alone I should decide against the objection, but the Rules refer to the Appendix, and it is therefore necessary to look at the two together, and on doing so I am driven reluctantly to the conclusion that they must be read together. Order VI., r. 10, provides that the solicitor shall not recover his costs unless he indorses the particulars. In order to ascertain what costs this rule refers to, we are driven to the Appendix, which fixes the costs at 4s., "where the particulars and copies are *signed* by a solicitor." It follows that the word "indorse" in Order VI., r. 10, means the same as "sign." Although, as I said, I arrive at this conclusion with reluctance, I do so without the slightest hesitation. The rule will be discharged.

MATHEW, J. I am of the same opinion. If the argument had depended on Order VI., r. 10, alone, I should have said that the technical view adopted by the registrar was wrong, but any ambiguity which exists in the Rule of Court is got rid of by reference to the Appendix. The words of the Appendix are "where the particulars and copies are *signed* by a solicitor," and in the column of the same Appendix relating to the higher scale, provision is made for the allowance of the costs of preparing particulars and copies, "provided that such particulars and copies are *signed* by the solicitor." We must therefore limit the meaning of the word "indorse" in Order VI., r. 10, by reference to the provisions in the Appendix, and construe it to mean "sign."

Rule discharged without costs.

Solicitors for the plaintiff: *Aird & Hood.*
Solicitors for the deputy judge: *Carter & Simpson.*

P. B. H.

[IN THE COURT OF APPEAL.]

1889
Oct. 25.

IN RE FRENCH. EX PARTE FRENCH.

Bankruptcy— Receiving Order — Jurisdiction — Petition presented in wrong Court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 95, 97—*Bankruptcy Rules*, 1886, *r.* 25.

When a bankruptcy petition has by inadvertence been presented in the wrong Court, that Court has jurisdiction to make a receiving order, and the proceedings can afterwards be transferred to the proper Court.

Ex parte May (14 Q. B. D. 37) approved.

APPEAL against a receiving order made by the London Bankruptcy Court.

One of the grounds of the appeal was, that the London Bankruptcy Court had no jurisdiction to make the order, because the debtor had not, as required by s. 95 of the Bankruptcy Act, 1883, for the greater part of six months before the presentation of the petition resided or carried on business within the district of that Court, but had, to the knowledge of the petitioning creditor, during that period resided at Southsea, in Hampshire. The registrar held that he had jurisdiction, and made a receiving order.

Morton Daniel, for the appellant. Under the circumstances, the High Court had no jurisdiction: Bankruptcy Act, 1883, s. 95. (1) Clause (3) of s. 95 only prevents proceedings taken

(1) Sect. 95 provides: "(1) If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district as defined by this Act for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any county court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court. (2) In any other case the petition shall be presented to the county court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition. (3.) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court."

By s. 97: (1.) "Subject to the provisions of this Act, every Court having original jurisdiction in bankruptcy shall have jurisdiction throughout England. (2.) Any proceedings in bankruptcy may at any time, and

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in a wrong court from being invalidated in case objection to the jurisdiction is not taken at the right time. In the present case the objection was taken as soon as possible. *Ex parte May* (1) is distinguishable; there there was a bonâ fide mistake as to the situation of the debtor's place of business.

Bartley Denniss, for the petitioning creditor, was not called upon.

[Some other objections were taken to the receiving order, but they do not appear to be worthy of a report.]

LORD ESHER, M.R. The question of jurisdiction depends on the true construction of ss. 95 and 97 of the Bankruptcy Act. Those sections were considered in *Ex parte May* (1), and the Divisional Court sitting in bankruptcy then came to the conclusion that, reading the two sections together, it could not be said that the mere fact that a receiving order had been made by the wrong Court, but made by inadvertence, was enough to shew that that Court had no jurisdiction to make the order, but that, reading the two sections together, there was a necessary implication that the Court which made the order had jurisdiction to make it, and that the proceedings could afterwards be remitted to the proper Court. The jurisdiction of the Court which actually made the order was not ousted. Then there is rule 25 of the Bankruptcy Rules of 1886, and, having regard to that rule, it is impossible to say that the Court had no jurisdiction. That rule assumes that the Court which has made the order had jurisdiction

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at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one court to another court, or may by the like authority be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have been commenced."

By rule 25 of the Bankruptcy Rules, 1886: "When any bankruptcy proceeding has been commenced in a court in which it should not have been commenced, the judge of that Court, or the judge of the High Court, may order that the proceeding shall be transferred to the court in which the same should have been commenced, or that it be continued in the court in which it was commenced: but, unless and until a transfer is made under these rules, the proceeding shall continue in the court in which it was commenced."

(1) 14 Q. B. D. 37.

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to make it. I think the decision of the Divisional Court in *Ex parte May* (1) was right. This objection, therefore, fails.

[His Lordship then dealt with the other objections, and held that they could not be maintained.]

LINDLEY, L.J. I am of the same opinion. The point as to jurisdiction is decided by the language of ss. 95 and 97, and rule 25 shews how those sections ought to be construed.

LOPES, L.J. I agree.

Appeal dismissed.

Solicitor for appellant: *T. S. Ashwin.*

Solicitors for respondent: *Newman, Hays & Co.*

W. L. C.

IN RE GEE. EX PARTE THE OFFICIAL RECEIVER.

Nov. 1.

Bankruptcy—Disclaimer—Lease—Onerous Covenants—Assignment of whole Term by way of Mortgage—Bankruptcy of Lessee—Trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.

Where the lessee of premises subject to onerous covenants had before his bankruptcy assigned the premises by way of mortgage for the entire residue of the term:—

Held, that the trustee in bankruptcy not being liable upon the covenants of the lease either by privity of contract or by privity of estate, the equity of redemption which vested in him was not "property burdened with onerous covenants" within the meaning of s. 55 of the Bankruptcy Act, 1883.

CASE stated for the opinion of the High Court, pursuant to s. 97 of the Bankruptcy Act, 1883, by the judge of the county court at Birmingham.

The material facts were as follows: By lease dated September 20, 1886, between W. Crowson (lessor) and Thomas Gee (lessee), the lessor demised to the lessee a piece of land for a term of ninety-nine years from September 29, 1886, at a ground rent of 17*l.* 10*s.* The lease contained covenants by the lessee for the payment of ground rent, rates, taxes, and outgoings, for building houses on the demised land, and for painting and keeping in repair the houses and premises when built, &c.

By indenture of mortgage, dated July 27, 1877, and made between the lessee and the lessor, the lessee assigned to the

(1) 14 Q. B. D. 37.

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lessor the demised premises, with the buildings then erected and thereafter to be erected thereon, for the whole of the residue of the term of ninety-nine years created by the lease to secure a debt of 810*l.* and interest.

On January 16, 1889, the lessee was adjudged bankrupt, and on January 18 an order was made for the summary administration of his estate, whereby the official receiver became the trustee in the bankruptcy.

The equity of redemption in the demised premises was of no value, and the bankrupt's estate was without any assets.

The question for the Court was whether the interest which the bankrupt had in the demised premises at the commencement of the bankruptcy consisted of land burdened with onerous covenants or binding the possessor thereof to the performance of any onerous acts, or to the payment of any sum of money within the meaning of s. 55 of the Bankruptcy Act, 1883.

Muir Mackenzie, for the Board of Trade. When leaseholds are mortgaged, not by sub-demise but by assignment of the whole term, the liability of the lessee on his covenants in the lease does not, on his bankruptcy, devolve on the trustee in bankruptcy, but is a provable debt: *Collyer* v. *Isaacs* (1); *Morgan* v. *Hardy* (2); and the liability on the covenants which run with the land devolves on the assignee of the term: *Titterton* v. *Cooper* (3); *Wilson* v. *Wallani* (4); *Mayor, &c., of Carlisle* v. *Blamire* (5); Coote on Mortgages, 5th ed. p. 265. Again, the equitable assignee of a lease is not liable for the covenants running with the land: *Moore* v. *Greg* (6); *Cox* v. *Bishop* (7); *Haywood* v. *Brunswick Building Society*. (8) Therefore the bankrupt's equity of redemption which vested in the trustee is not property burdened with onerous covenants within the meaning of s. 55 of the Bankruptcy Act, 1883, and the trustee is under no liability to perform the covenants which run with the land, and it is unnecessary for him to disclaim the bankrupt's interest in the lease.

(1) 19 Ch. D. 342, at p. 351.
(2) 18 Q. B. D. 646.
(3) 9 Q. B. D. 473, at p. 475.
(4) 5 Ex. D. 155.
(5) 8 East, 487.
(6) 2 Ph. 717.
(7) 26 L. J. (N.S.) Ch. 389.
(8) 8 Q. B. D. 403.

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CAVE, J. I think in this case no disclaimer under s. 55 is required. The section enacts that "where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants," and so on. The question is, whether the bankrupt had amongst his property any land burdened with onerous covenants. Now at the time when the lease was executed he undoubtedly had, because he was lessee, and, as such, was bound to perform the covenants of the lease; and, if he had continued to be lessee up to the time of his bankruptcy, the effect of the bankruptcy would have been that the trustee would have become assignee of the term, and, as such assignee, bound to perform those onerous covenants. It was with the view of enabling the trustee to get rid of the liability in such a case that s. 55 was framed. In this case, however, previous to the bankruptcy, the bankrupt had assigned the lease. Undoubtedly in an ordinary case of assignment for value the assignor after the assignment remains liable on his covenants, and the assignee is also liable on them by virtue of privity of estate. It is only on the ground of privity of estate that the trustee would ever become liable on those covenants; and, inasmuch as the previous assignment has transferred that liability to the assignee, leaving on the bankrupt only the liability under the covenants arising out of privity of contract, he ceases to have the land burdened with onerous covenants. It is true that some years ago a question did arise as to whether in the case of a mortgage the general rule applied. This, however, was decided in the affirmative some considerable time ago; and it cannot be doubted at this day that, where there is an assignment of the whole term to a mortgagee, the mortgagee becomes by virtue of the assignment the owner of the lease burdened with the covenants, and the assignor no longer possesses any land burdened with onerous covenants which can by virtue of the statute become vested in the trustee. It is true that the assignor, where the assignment is by way of mortgage, retains the equity of redemption; but that is an equitable right which is not burdened with onerous covenants. It is not because he is owner of the equity of redemption that he can be compelled to perform the covenants, but solely by virtue of the privity of contract that exists between him and the lessor, and

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that liability cannot by bankruptcy be transferred to the trustee. The right to call for a re-conveyance, no doubt, is transferred, and does pass to the trustee; and, if the trustee should choose to exercise that right and have a re-conveyance or re-assignment executed to him, he would then become the owner of the land burdened with onerous covenants. He cannot be forced to exercise that right; and s. 55, the object of which is to free him from a liability which he is compelled to take on himself, cannot apply to the mere case of the transfer to him of the equity of redemption which is accompanied by no burden, unless he chooses to take the burden on himself. I am therefore of opinion that there is in this case no land or property belonging to the bankrupt within the meaning of s. 55, and consequently that no disclaimer under that section is necessary.

Solicitor: *W. Murton.*

H. L. F.

Nov. 1.

IN RE WAYMAN. EX PARTE THE OFFICIAL RECEIVER.

Bankruptcy — Trustee a Solicitor — Remuneration — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 72, *sub-ss.* 1, 2, *and* 4, *and s.* 73, *sub-s.* 2—*Bankruptcy Rules*, 1886, *rr.* 305, 306.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 72, where creditors appoint any person to be trustee of a debtor's estate his remuneration (if any), is to be fixed, if the creditors so resolve, by the committee of inspection, and shall be in the nature of a commission or percentage, one part payable on the amount realized and the other part on the amount distributed in dividend.

By s. 73 (2), where the trustee is a solicitor he may contract that the remuneration for his services as trustee shall include all professional services.

The creditors of a bankrupt appointed a solicitor the trustee in the bankruptcy "at a remuneration to be fixed by the committee of inspection;" and subsequently the committee passed a resolution that the remuneration of the trustee should be "his proper professional charges as a solicitor for attendance and work done and expenses incurred by him in or about the proceedings in the bankruptcy":—

Held, that the resolution was invalid, inasmuch as it was contrary to s. 72, which required that the remuneration should be a commission or percentage on the amount realized or distributed.

Semble, that where the trustee, being a solicitor, contracts, under s. 73 of the Act, with the committee of inspection that his remuneration shall include his professional charges, the proper course is to fix his commission or percentage as trustee under s. 72 at such a rate as will cover his reasonable professional charges.

APPLICATION to review the taxation of the trustee's bill of costs.

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The proceedings were instituted in the county court at Cambridge, and the first meeting of the creditors was held on June 1, 1888, when William Peed, a solicitor, was appointed the trustee "at a remuneration to be fixed by the committee of inspection." The committee afterwards passed the following resolution: "That the remuneration of the trustee in this matter shall be his proper professional charges as a solicitor for attendance and work done and expenses incurred by him in or about the proceedings in the bankruptcy."

Under this resolution the trustee did business as a solicitor in connection with the estate, and delivered his bill of costs. On taxation before the registrar objection was taken by the official receiver to the whole of the profit charges contained in the bill, on the ground (1) that the resolution of August 24, 1888, was invalid and inoperative having regard to ss. 72, sub-s. 1, and 73, sub-s. 2, of the Bankruptcy Act, 1883, and rr. 305 and 306 of the Bankruptcy Rules, 1886; (2) that the trustee being a solicitor could not charge the estate for business done in that character in the bankruptcy; and (3) that a solicitor-trustee is not entitled to charge the trust estate with costs for professional services.

The registrar allowed all the profit charges, and his decision was affirmed on review by a bankruptcy taxing master of the High Court, the master being of opinion that the resolution in question was valid under s. 72, sub-s. 1, and that the true construction to be placed on s. 73, sub-s. 2, is that a solicitor-trustee may, if he chooses, contract that the remuneration to be paid to him shall include all professional charges, but that, if he does not so contract, he is entitled to charge for the latter outside of and independently of his other remuneration, which is in the nature of a commission or percentage.

The matter was then by consent, and at the request of the Board of Trade, referred to the judge for decision.

Muir Mackenzie, for the Board of Trade. The resolution of the committee was ultra vires. They could only vote the trustee remuneration in manner prescribed by the Act and Rules. Sect. 72, and rr. 305 and 306 of 1886 contain a positive direction

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that the remuneration shall be by way of commission or percentage. No doubt a solicitor-trustee can, under s. 73, contract that his remuneration shall include his professional charges, and the committee could easily have passed a resolution that his remuneration should be such and such a commission or percentage to include all his professional charges. But that was not done here.

Tindal Atkinson, for the trustee. The argument of the other side takes no account of s. 73, sub-s. 2, of the Act. But the word "remuneration" in s. 73 is not to be restricted as in s. 72. The two sections are distinct. Under s. 72 the committee are to fix the trustee's remuneration by way of commission or percentage; and then s. 73 provides that when they employ a solicitor-trustee they may contract that he shall have his professional charges in addition to his commission as trustee. The resolution therefore was not invalid or inoperative.

CAVE, J. It seems to me that the committee have done here what they have no power to do. Sect. 72 is very plain. It says that, where the creditors appoint a trustee, his remuneration shall be in the nature of a commission or percentage; and then s. 73 says that, where the trustee is a solicitor, he may contract that his remuneration shall include professional services. Of course, the result of that would be that the remuneration would be higher than that of an ordinary trustee; but still it must be in the nature of a commission or percentage by virtue of s. 72. The result, therefore, is that the resolution in this case is ultra vires and inoperative, and that no remuneration has been voted to the trustee at all. He must, therefore, send in his claim and have it taxed under sub-s. 4 of s. 72, as if no remuneration had been voted.

Solicitors: *W. Murton; F. & T. Smith & Sons, for W. Peed, Cambridge.*

H. L. F.

[IN THE COURT OF APPEAL.]

1889
Nov. 8.

IN RE HECQUARD. EX PARTE HECQUARD.

Bankruptcy — Receiving Order — Domicil — Jurisdiction — Debtor having "Dwelling-house" in England—Foreigner temporarily in England—Debtor having only one Creditor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 1 (*d*).

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6, sub-s. 1, "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless (inter alia) (*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided, or had a dwelling-house or place of business in England."

A domiciled Frenchman came to England for the purposes of an action which he had commenced in the English Courts. He took five furnished rooms on the third and fourth floors of a house in London. He occupied the rooms exclusively for three months from March to June, living in them with his wife and two servants. During the three months he paid frequent visits to France, and at the end of the three months returned there. In September of the same year a bankruptcy petition was presented against him in the London Bankruptcy Court:—

Held, that he had had a dwelling-house in England "within a year before the date of the presentation of the petition," within the meaning of the Act, and that the petition was properly presented against him.

The fact that a debtor against whom a bankruptcy petition has been presented has no other creditor than the petitioning creditor is not a conclusive reason for dismissing the petition, but the Court has a discretion in the matter.

APPEAL from a receiving order.

The debtor was a domiciled Frenchman, who resided in Paris. On March 18, 1889, he commenced an action in the Chancery Division against the petitioning creditor for the specific performance of an agreement relating to a concession of some mines in Burmah. For the purposes of this action he came over to London about March 13, and stayed for a few days at an hotel, and he then took some furnished rooms in a house No. 32, Piccadilly Circus, for a month. He took these rooms from a Mr. Mayhew, who was the occupier of the third and fourth floors of the house, which he had furnished himself. There were six rooms, one of which Mayhew reserved for his own use, and the other five he let to the debtor. The debtor had the exclusive use of the five rooms. At the end of the month he took them on for another month, and so again at the end of the second

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month. At the end of the third month he returned to France. During the three months he lived in the rooms with his wife and a servant whom they brought with them from France. He also engaged the services of a boy who had been employed by the former occupier. During the three months he paid frequent visits to France where his children were.

On September 9 the bankruptcy petition was presented against the debtor. On the hearing of the petition he was examined, and, being asked whether he had any creditors in England besides the petitioning creditor, he said that he did not know of any, except a tailor for a pair of trousers. He also said that he had no property whatever in England. No evidence was given of the existence of other creditors. The registrar held that the debtor had "within a year before the date of the presentation of the petition ordinarily resided in England," and made a receiving order.

Sidney Woolf, and *Ringwood*, for the debtor. First (1), the debtor had not, as required by s. 6, sub-s. 1 (*d*) (2), "within a year before the date of the presentation of the bankruptcy petition, ordinarily resided, or had a dwelling-house in England."

Secondly, the debtor has only one creditor and has no assets in England.

As to the first point. The debtor is a Frenchman, domiciled in and resident in France. The evidence does not support the registrar's conclusion that he had "ordinarily resided" in England within a year before the presentation of the petition. He only came over here temporarily for the purposes of the Chancery action, and during the three months for which he took the five rooms he often went over to France, to see his family. In *In re Norris* (3) the debtor had resided in England for a much longer time than the present debtor. Nor can it be said that

(1) Other objections besides those stated in the report were taken to the receiving order, but it is unnecessary to notice them.

(2) By s. 6 (1): "A creditor shall not be entitled to present a bankruptcy against a debtor unless . . . . (*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided, or had a dwelling-house or place of business in England."

(3) 5 Morrell, Banky. Cas. 111.

the debtor had a "dwelling-house" in England during the year before the presentation of the petition. A "dwelling-house" means an entire separate house, not a set of furnished apartments in a house occupied by another person. The debtor was a mere lodger in the rooms.

As to the second point, it is clear from the debtor's evidence that he has no other creditor than the petitioning creditor in England, and that he has no assets here. This objection could not be taken after the making of the receiving order: *In re Bullen.* (1) The Court may have jurisdiction to make a receiving order when the petitioner is the only creditor, but it is a matter of discretion, and the legitimate object of bankruptcy proceedings is the equal distribution of the debtor's assets among his creditors. The onus may not be on the petitioning creditor to prove the existence of other creditors, but it is open to the debtor to prove that there are no others.

Herbert Reed, for the petitioning creditor. In *In re Williams* (2) Mellish, L.J., said, that a man could not avoid the bankruptcy law by residing nowhere. If he had no other residence, the place where he was actually sleeping would be his residence for the purpose of being made a bankrupt. There is sufficient here to shew that the debtor had "ordinarily resided" in England. But at any rate he had a dwelling-house" in England within the year. He set up an establishment of his own in the five rooms and dwelt there, and the rooms were his "dwelling-house." A "dwelling-house" need not necessarily be a separate building. A set of rooms on one floor, commonly known as a "flat," would be the "dwelling-house" of the person who had the exclusive occupation of them, and the same principle applies to the five rooms which this debtor occupied.

As to the second point, the evidence only shews that the debtor thinks he owes no debts. But if he has no other debts, that alone is not a conclusive answer to the petition.

Sidney Woolf, in reply. *Ex parte Williams* (2) was a decision upon s. 59 of the Bankruptcy Act, 1869, which has now been replaced by s. 95 of the Bankruptcy Act, 1883, the question being, which Court in England had jurisdiction over a debtor?

(1) 5 Morrell, Banky. Cas. 243. (2) Law Rep. 8 Ch. 690.

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LORD ESHER, M.R. The question depends upon whether the facts are such as to bring the debtor within s. 6 of the Bankruptcy Act, 1883, which provides that "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless (*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided, or" (that is, within a year before the date of the presentation of the petition) "had a dwelling-house or place of business in England." It is quite clear that the time during which the debtor has "ordinarily resided" or has "had a dwelling-house" in England, need not be the whole of the year before the presentation of the petition; it is to be "within a year" before the presentation of the petition. If within the year the debtor has had a dwelling-house in England, no time is limited during which he must have dwelt in it. If he is not a mere passing or casual visitor he has got such a hold on this country as is to make him liable to the English bankruptcy law. In the present case, the debtor was certainly not a mere casual visitor to this country, making a journey through it for the purpose of seeing it. He came here and took furnished rooms. He was not like a person living at rooms in an hotel in the ordinary way. He took five furnished rooms, situate on two floors of a house in Piccadilly Circus (I suppose two were on one floor and three on another). There must have been a common staircase in the house. A Mr. Mayhew had taken six rooms from the owner of the house, and had, of course, furnished them. He had the exclusive use of the rooms which he had furnished, and had an entrance (probably two or more entrances) to them from the common staircase. He let five of these rooms to the debtor, and kept the sixth for himself. He did not reserve to himself any right to enter the rooms which he had let to the debtor; there was nothing to constitute the debtor his lodger. The debtor was a tenant of Mayhew, and as such for a certain time was to have the exclusive and absolute use of the five rooms. He brought his wife and his own servant with him, and lived with them in the rooms. In my opinion, the rooms became his "dwelling-house."

It is further said that a receiving order ought not to have been

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made, because the petitioner is the only creditor of the debtor in this country. It may be that he was the only creditor who was made known to the registrar at the time when he heard the petition. Is that enough to make it the duty of the registrar to dismiss the petition? In my opinion it would not be enough, even if it were clear that the petitioner is the only creditor. There might be very good reasons why the debtor should be made a bankrupt, even if he had in fact only one creditor. Assets might be got in by the trustee in a bankruptcy which could not be realized in any other way. But is the fact that the petitioner was the only creditor who appeared before the registrar a sufficient reason for dismissing the petition? How was the petitioning creditor to know whether the debtor had other creditors? Was it part of his duty to prove that there were other creditors? In my opinion it was not. Other creditors may come forward when the advertisements of the receiving order have been issued. At any rate it was not the duty of the petitioning creditor to prove the existence of other creditors, and the mere fact that the debtor said that he had no other creditors was not sufficient to justify the registrar in taking it for granted that there were no others. That objection, therefore, fails. Then it is said that the debtor has no assets in England. It seems to me that that is a matter which could not be inquired into then. The question whether the debtor has or has not any assets depends upon a variety of circumstances.

The objections to the receiving order all fail, and the registrar's decision was quite right.

LINDLEY, L.J. I am of the same opinion. The only point which seems to me to present any difficulty is that which relates to the debtor's "dwelling-house." It is unnecessary to consider the question whether the bankrupt had, within a year before the presentation of the petition, "ordinarily resided" in England. I do not see why the five rooms, of which he was in the exclusive occupation, cannot fairly be described as his "dwelling-house." A "dwelling-house" need not, in my opinion, be a separate building; it may be bounded by a horizontal plane just as well as by a vertical plane. I do not think we shall be unduly stretching

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the bankruptcy law by holding that these rooms constituted the bankrupt's "dwelling-house." There is no real difficulty in the other points. If the debtor has only one creditor this is a point to be considered by the registrar on hearing the petition, but it cannot be laid down as a matter of principle that, if there is only one creditor, the registrar ought to dismiss the petition. The trustee in a bankruptcy may be able to set aside transactions and get in assets which could not be set aside or got in without an adjudication of bankruptcy. The mere fact that a man has only one creditor is not a sufficient ground for saying that bankruptcy proceedings cannot be maintained against him.

LOPES, L.J. The first question is, whether the debtor had, within a year before the presentation of the petition, a "dwelling-house" in England. It is perfectly clear that he was not a mere traveller passing through this country without any intention of remaining in it. He had the exclusive possession of five rooms in a house for a period of three months, and he "dwelt" there. He brought with him his wife and one servant, and he kept on another servant who had lived with the former occupier of the rooms. Mr. Woolf argued that a "dwelling-house" must be an entire house. I cannot agree with that construction. In my opinion the five rooms were the debtor's "dwelling-house" within the meaning of the Act.

Another point is, that the debtor has only this one creditor in England, and that he has no assets in England. It is admitted that this is not enough to oust the jurisdiction of the Court, and that the making of a receiving order is a matter of discretion. I can imagine cases in which bankruptcy proceedings ought to be stayed if there was only one creditor, but here the registrar was satisfied that there was no reason for staying the proceedings. I agree with Lindley, L.J., that assets may be realized in a bankruptcy which could not be realized in any other way.

Appeal dismissed.

Solicitors for debtor: *Lumley & Lumley.*
Solicitors for creditor: *Smiles, Binyon, & Ollard.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Nov. 26.

BARTON AND ANOTHER *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Company—Companies Clauses Act, 1845 (8 & 9 *Vict. c.* 16), *s.* 18—*Shares, Transmission of, in consequence of Death—Executors—Register of Shareholders—Executors described on Register as such—Transfer of Shares by one of two Executors—Notice of Transfer—Estoppel.*

When, under the Companies Clauses Act, 1845, s. 18, the names of executors of a deceased shareholder in a company are placed on the register of shareholders in respect of shares which belonged to their testator, they become joint shareholders in their individual capacity, although they may be described as executors in the register: and consequently the shares can only be transferred by means of a transfer executed by all of them.

Application having been made to a company to register a transfer of stock, the company sent a letter giving notice of it to the holder of the stock on the register, and stating that, unless they heard from her to the contrary, the stock would be transferred in their books. She did not answer the letter, and the company subsequently registered the transfer. Her signature to the transfer being a forgery, she brought an action against the company claiming to have her name replaced on the register as holder of the stock:—

Held, that she was not estopped from alleging that the transfer was invalid, and was entitled to the relief claimed.

APPEAL from the judgment of Manisty, J., at the trial.

The action had been commenced in the Chancery Division, and having been transferred for trial by a jury was tried before the learned judge, when the facts appeared to be as follows. (1) The plaintiff Ann Barton, and one Thomas Barton, her stepson, were the executors and trustees of the will of Samuel Barton, deceased. The testator died in January, 1870, possessed of certain stock of the defendants' company, which was a railway company subject to the Companies Clauses Act, 1845. In February of the same year the probate of the will was lodged at the defendants' offices for registration, and an entry of the executors' names was made in respect of the stock in the defendants' stock ledger, a book

(1) The action was sent for trial by a jury, because at first an issue was raised as to whether certain signatures were forged. Before the trial circumstances transpired which clearly shewed them to be forged, and the fact that they were so was ultimately admitted by the defendants. Consequently the jury was discharged by consent, and the case tried by the learned judge without a jury.

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kept by the defendants which appeared to fulfil the function of the register of shareholders required to be kept by s. 9 of the Companies Clauses Act, 1845. They were entered as follows: "The executors of Samuel Barton, Thomas Barton, and Ann Barton." Thomas Barton afterwards, on various occasions between 1874 and 1885, without the knowledge of the plaintiff Ann Barton, sold portions of the stock and signed and executed transfers of the same to the purchasers. In the case of each transfer he forged the signatures of the plaintiff Ann Barton and the attesting witness. The transfers were registered in due course by the railway company; and the proceeds of the sales of the stock were without the knowledge of the plaintiff received and misappropriated by Thomas Barton. Dividend warrants in respect of the stock standing in the names of the executors were sent from time to time to Thomas Barton. Down to 1872 the receipts on such warrants were signed by both the executors; afterwards they were signed by Thomas Barton alone. He accounted for the amount of the dividends that should have been payable, and so the frauds remained undiscovered. In the case of the last of the forged transfers the defendants, when the same was lodged with them for registration, sent a letter giving notice to the plaintiff Ann Barton that a transfer of the stock had been so lodged, and that, unless they heard to the contrary from her within a week, the stock would be transferred in the books of the company, of which however she took no notice, being told by Thomas Barton that it was all right, and she need not take any notice of it. In 1886 Thomas Barton retired from the trusts of the will, and Elizabeth Ashe, the other plaintiff, was appointed in his place. Thomas Barton shortly afterwards absconded, and, the forgeries being then discovered, the plaintiffs claimed that, the transfers being null and void, they were still the owners of the stock which the transfers purported to transfer and entitled to be registered as such. The defendants declining to give effect to such claim, the action was brought claiming that the defendants should be ordered to appropriate or purchase and register in the names of the plaintiffs the amounts of stock in question. (1)

(1) Sect. 18 of the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), provides: "If the interest in any share have become transmitted in conse-

The learned judge gave judgment for the plaintiffs and made an order accordingly.

Sir R. E. Webster, A.G., and *O. Leigh Clare*, for the defendants. The transfers were valid and effectual though executed by one executor only. The executors in this case never became stockholders or joint owners of the stock. The terms of the entry in the stock ledger, in which they are described as executors, shew that such entry only referred to them in their representative capacity. The executors sent in the probate of the will for registration, but there is no evidence that they ever asked to be placed in their personal capacity on the register of shareholders as holders of the stock. All they did was to give notice to the company of their title to the stock in their representative capacity. In *Buchan's Case* (1) Lord Selborne said, "the case of trustees, who take a transfer of shares into their names, differs in principle from that of executors, who merely intimate their title as executors to a company, in order to claim and exercise the rights which belong to them as the legal representatives of their testator. That distinction was pointed out by Lord Hatherley when Vice-Chancellor in the English case of *Hoare* (2), where he said "a person who is a shareholder is absolutely liable, although he may be bound to apply the proceeds of the shares upon a

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quence of the death, or bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or by any other lawful means than by a transfer according to the provisions of this or the special Act, such transmission shall be authenticated by a declaration in writing as hereinafter mentioned, or in such other manner as the directors shall require; and every such declaration shall state the manner in which and the party to whom such share shall have been so transmitted, and shall be made and signed by some credible person before a justice or before a master or master extraordinary of the High Court of Chancery: and such declaration shall be left with the secretary, and thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders: and for every such entry the company may demand any sum not exceeding the prescribed amount, and, where no amount shall be prescribed, then not exceeding five shillings: and, until such transmission has been so authenticated, no person claiming by virtue of any such transmission shall be entitled to receive any share of the profits of the undertaking nor to vote in respect of any such share as the holder thereof."

(1) 4 App. Cas. 583, 595.

(2) 2 J. & H. 229.

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trust. The case is not the same as that of an executor: who may be a contributory as representing the testator's estate." Trustees have not in any proper sense of the word a representative character; but executors have. Having representative rights, it is impossible that they should not be entitled to produce the legal evidence of this to the company for the purpose of having their title in some way recorded and recognized without making themselves personally liable." Suppose this were a question of enforcing a liability to calls against the executors, these observations would be authority to shew that they never were members of the company, and therefore were not liable.

The authorities shew that, until the executors have done some act or acts shewing an election to come on the register as shareholders in their individual capacity, the relation in which they stand to the company is only that of representatives of the deceased shareholder: *In re Tahiti Cotton Company* (1); *Spence's Case* (2).

In *Buchan's Case* (3) it is true the company was registered under the Companies Act, 1862, whereas this company is governed by the Companies Clauses Act, 1845. The same principle, however, applies in both cases. An executor must no doubt authenticate the transmission in the manner required by s. 18 of the Companies Clauses Act, 1845, before he can deal with the shares or receive dividends; but he is not necessarily to be entered in the register as a shareholder under that section; he may be entered, as was done here, merely in his representative capacity.

It must be admitted that, if these persons became joint stockholders, and were registered as such in their individual capacity, a transfer of the stock could not be made by one of them; but, if their title was merely that of executors, and they never became stockholders, then the general rule of law with regard to executors would prevail, which is that one of two or more executors can assign property forming part of the testator's estate without the concurrence of the other or others: Williams on Executors, 8th Ed., vol. i., p. 916; *Simpson* v. *Gutteridge* (4). *Charlton* v.

(1) Law Rep. 17 Eq. 273.
(2) 17 Beav. 203.
(3) 4 App. Cas. 583.
(4) 1 Madd. 609, 616.

Earl of Durham (1) shews that the forged signature of one executor does not affect the validity of the transfer by the other.

With regard to the last of the forged transfers it is submitted that the plaintiff Ann Barton is estopped from disputing its validity, because she misled the company into changing their position by ignoring the notice they sent to her and not informing them that she had signed no transfer: *Ramsden* v. *Dyson*. (2) A plaintiff cannot come to a Court of Equity for relief, if his own conduct has misled the defendant and conduced to the loss. They cited *Barton* v. *North Staffordshire Ry. Co.* (3).

Rigby, Q.C., *Winch*, Q.C., and *A. Whitaker*, for the plaintiffs. It is not disputed that, if the executors were registered as shareholders, the transfer by one only would be invalid: *Sloman* v. *Bank of England* (4). By the terms of the Companies Clauses Act, 1845, s. 18, there is only one way of dealing with cases of transmission of shares. The company must register the parties claiming by transmission as shareholders under s. 18. The company could not put such persons on the register without a claim by them; but, if they claim to be entitled by transmission, then the only procedure for giving effect to the claim is under the 18th section, and it expressly directs that the secretary shall enter the names of the persons so claiming on the register of shareholders, obviously as shareholders. Under this Act executors cannot, without being registered, transfer shares or receive dividends on them, or vote in respect of them. Here it is clear that the executors did claim to be entitled by transmission, for they sent in the probate, and they received dividends on the stock.

The observations of Lord Selborne in *Buchan's Case* (5) had relation to a company registered under the Companies Act, 1862, the provisions of which are quite different from those of s. 18 of the Companies Clauses Act, 1845.

The executors in this case must be considered to have been put on the register as shareholders notwithstanding the addition of "executors" to their names. The practice has always

(1) Law Rep. 4 Ch. 433.
(2) Law Rep. 1 H. L. 129.
(3) 38 Ch. D. 458.
(4) 14 Sim. 475, at p. 488.
(5) 4 App. Cas. 583.

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been in cases where executors have been put on the register in respect of shares to require the signatures of all to a transfer.

With regard to the last transfer, there can be no estoppel. There are no moral grounds for such an estoppel, because the plaintiff Ann Barton was deceived by Thomas Barton, who told her there was no need to answer the notice: and in point of law there was no obligation or duty on the plaintiff to answer the defendants' notice. The plaintiffs are not seeking equitable relief, but insisting on their legal rights. The claim is in substance for a mandamus to correct the register by inserting their names as owners of the stock which has been wrongfully transferred into other names: *Davis* v. *Bank of England* (1).

Clare, for the defendants, did not reply.

LORD ESHER, M.R. In this case the plaintiff Ann Barton and Thomas Barton were appointed by the will of the testator his executors, and stock in the London and North Western Railway Company was left to them for certain purposes stated in the will, but which it is not necessary to particularize. The plaintiff's co-executor, Thomas Barton, afterwards fraudulently sold portions of this stock, and the purchasers in the ordinary course required transfers of the stock so sold, in order that they might get themselves registered. It seems clear that he had no idea that the law was as now suggested for the defendants, or that he could by himself make a transfer which the company would be bound to register; and I strongly suspect that the company had no such idea and would not have registered the transfers unless executed by the plaintiff, Ann Barton. Accordingly he forged the signatures of the plaintiff and the attesting witness to the transfers, and handed them over to the purchasers. They took the transfers to the company, and the company registered them as the owners of the stock. In process of time the fraud was discovered, and this action was brought against the company. The claim substantially is that, the defendants having wrongfully erased the name of Ann Barton from the register and inserted the names of other people in derogation of her rights, the defendants are bound to restore the register to the state in

(1) 2 Bing. 393; 5 B. & C. 185.

which it was before: that they are bound to keep their register correct, and that, having made it wrong, they must put it right again. This the defendants decline to do. They say that they had a right to register the transfers, because it was immaterial that Ann Barton's signature to them was forged, such signature not being wanted at all. They say that the transfers might have been executed by one executor alone, and that, if they had been so executed, they would have been bound to register, and would in fact have registered the transferees as owners of the stock. The defendants declining to give effect to the plaintiffs' claim, the plaintiffs come to the Court and ask for relief, viz. that the Court should order the defendants to make their register correct. The argument on the part of the defendants is that the plaintiff Ann Barton and Thomas Barton were co-executors; that, as such executors, they were proprietors of personal property, viz. this stock; that, if two executors are entitled in their representative capacity to personal property, one of them can dispose of it without the other; and consequently that Thomas Barton had power to transfer and did transfer this stock. It is said on the other side that, admitting it to be true with regard to personal property in general that one executor may dispose of it without the concurrence of the other, this is not a question with regard to personal property generally, but with regard to stock of a railway company; that executors must be put on the register in order that they may deal with such stock as owners, and, though as between themselves and the beneficiaries under the will they may be trustees, when they are put on the register they are the legal shareholders; that, when two executors are on the register, the company has no right to accept a transfer executed by one only as valid, because, they being joint holders of the stock, a transfer can only be made by both: and that this is so by virtue, not of the general law with regard to executors, but of the provisions of the Companies Clauses Act, 1845. The question really seems to be whether, under the Companies Clauses Act, these two persons must be treated as being on the register as shareholders. It is true that they were in fact executors, and that, with regard to the beneficiaries mentioned in the will, they would be trustees of the stock, but the company does not take notice of any trust,

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and must act in accordance with the Act of Parliament, under which it is constituted, with regard to placing persons upon the register. The question really depends upon the 18th section of the Companies Clauses Act, 1845. That section is as follows: "If the interest in any share have become transmitted in consequence of the death, &c., of any shareholder, such transmission shall be authenticated by a declaration in writing as hereinafter mentioned, or in such other manner as the directors shall require." It may be that this provision is not obligatory in one sense, but it seems to me that it is so far obligatory that no effect can be given to the transmission, so far as the company is concerned, till such authentication is effected. It does not appear that the directors in this case have required an authentication in any particular manner, and therefore the authentication would have to be as mentioned in the Act. The section goes on: "And every such declaration shall state the manner in which and the party to whom such shares shall have been so transmitted, and shall be made and signed by some credible person before a justice or before a master or master extraordinary of the High Court of Chancery." I do not think that the declaration can state the party to whom such share shall have been transmitted without giving his name. It seems to me that it would not be sufficient to say that the transmission was to the executors of such a person without naming them. I do not think that the directors could make a regulation that the authentication need not comply with these two requirements of the Act. They may add requirements with regard to the manner of effecting the authentication, but I do not think they could authorize the omission of these. So, when the transmission is to persons as executors, it must be stated that that is so, and their names must be given. Then the section proceeds, "and such declaration shall be left with the secretary, and thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders:" and then it is provided that a fee may be charged for such entry, and that, until such transmission has been so authenticated, no person claiming by such transmission shall be entitled to any share of the profits of the undertaking or to vote as holder of the shares. There again the provision is not obligatory in the sense that the party entitled must leave the declaration with the secretary, but

it is obligatory in the sense that such declaration can only be effective against the company if it is left with the secretary as required. If the person claiming does leave it, it can only be for one purpose, viz. to make his claim effective against the company; and the effect of so leaving it is not only to authorize but to require the secretary to act in the manner provided by the Act. The person claiming by virtue of the transmission cannot say, Make it effective in my favour to a certain extent, but not so as to make me liable. He cannot leave it and impose any conditions, because the Act imposes on the secretary, when it is left, an obligation: it says that "thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders." The declaration is to state the name of the person, and there is an express enactment that the name stated in the declaration so left with the secretary shall be entered in the register. Therefore it is the secretary's duty to enter the name, and, when it is so entered, there can be no question, I think, but that such person is a shareholder in the company. The present case must be treated, I think, on the footing that, the executors having complied with the provisions of this section, the secretary did thereupon, in pursuance of the section, enter their names in the stock ledger, which is the only book kept by the defendants for the purposes of, and which must be treated as, the register of shareholders. I will treat the case for this purpose as if the executors had desired the secretary to put their names on the register, but with the condition that they should be put on as executors merely, and not so as to involve them in any liability. But the conclusion which I come to is that, even if they did desire that, and even if the company acquiesced, and thought that the entry might legally be made subject to this limitation, it cannot legally be done, and the limitation is illegal and of no effect. If these persons were on the register as shareholders, it is admitted that a transfer by one of them only would be an invalid transfer. These transfers were by one of them only, and therefore the directors were misled by these forgeries into supposing that valid transfers had been made, and wrongly removed Ann Barton's name from the register, and the plaintiffs are entitled to the remedy they claim.

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Against that view of the matter were cited certain dicta of Lord Selborne in *Buchan's Case* (1), which, so far as I am concerned, I should regard as being as nearly as possible equivalent to binding decisions, and from which, having regard to the subject-matter and to the fact that they were uttered in the House of Lords, it would be almost impossible for me to differ. If I thought that that case stood on the same footing as this I would refer to those dicta at length, but I do not think that it is necessary. I am clearly of opinion that he said what he did, having heard the judgment of Lord Cairns, and that he was taking the same view as Lord Cairns had done. The view Lord Cairns took in that case was that, as soon as persons became executors, they might make a contract for sale of such shares as those in question in that case, and, if they did so, they might go to the company without being registered as shareholders and say that they did not wish to be registered as shareholders, that they had made a legal contract with another person that he should be the shareholder and be registered as such, a contract which they were entitled to make, and to which the company were bound to give effect: and that in such a case they would be entitled to say that they never were on the register as shareholders and never were shareholders, and therefore were not liable to calls; but, inasmuch as in the particular case the parties had not done that, but had got their names put on the register as shareholders, that being so, it did not matter whether they were described as executors or not, and the appellant was liable to be put on the list of contributories. The view taken in that case might, if this case involved a question of liability on the part of the executors to calls, have had some bearing on that question, but it is no authority for saying that in this case the executors could without themselves being registered have made a contract for sale of the stock and compelled the company to register their vendees. That case depended on certain sections of the Companies Act, 1862, the provisions of which are different from those of s. 18 of the Companies Clauses Act, 1845. Under that section I do not think that the executors could insist on the company's registering the names of persons to whom they had contracted to sell the

(1) 4 App. Cas. 583.

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stock without themselves being registered. In order to perform any contract they might make for the sale of the stock they must themselves be registered under the section, and directly they are so registered they become in my opinion shareholders, subject to the liabilities, and entitled to the rights of such. I thought at first that that might be in some cases a hardship to executors, but, as has been pointed out, they would be entitled to be indemnified out of the estate of which the shares in question were a part, and, if in such a case the shares were worth nothing, it would appear that they could let them alone, and need not subject themselves to liability. It does not appear to me that there is anything in the authorities cited that leads to the conclusion that s. 18 of the Companies Clauses Act, 1845, is to be construed otherwise than according to the ordinary meaning of the words in the English language, which is as I have stated. With regard to the last transfer, of which notice was sent to the plaintiff, it is alleged that, having disregarded such notice, she is estopped from saying that the transfer is bad, or if she is not estopped, that, as she is claiming equitable relief, if she has misled the defendants by not answering their letter, to that extent she is not entitled to such relief. This latter point does not, as it seems to me, arise, because in substance what she is claiming is to have the register made right, which is her legal right as a shareholder; and I cannot think that the circumstances bring the case within any kind of estoppel. For these reasons I think that the judgment of the learned judge was correct and that this appeal should be dismissed.

LINDLEY, L.J. I am of the same opinion. This case shews the importance of not treating all companies as governed by the same law, when in truth they are governed by a variety of enactments. There are two great parallel lines of legislation with regard to companies; one being that of the Companies Act, 1862, the other that of the Companies Clauses Act, 1845. The provisions of these Acts are by no means alike; and it is always necessary in dealing with a company to look to the provisions of the particular Act by which it is governed. We have in this case to look to the provisions of the Companies Clauses Act, 1845; we

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have nothing to do with the Companies Act, 1862. The 18th section of the former Act is that which mainly governs this case. To understand that section one must refer to s. 7, which provides that shares shall be personal estate; s. 8, which provides that every person who shall have subscribed to the capital or otherwise become entitled to a share, and whose name shall have been entered on the register of shareholders, shall be deemed a shareholder; s. 9, which imposes on the company the duty of keeping a register of shareholders; and s. 14, which provides that every shareholder may sell and transfer all or any of his shares and that every such transfer shall be by deed. Then we come to s. 18, which relates to the "transmission" of shares, which I understand to mean the devolution of title to shares otherwise than by transfer. The term "transmission" appears to be used in contradistinction to "transfer," and to include devolution by death, bankruptcy, marriage, and in any other way than by transfer. I think that that view of the scope of the section gives the key to the question in this case. The section provides that, if the interest in any share has become transmitted in consequence of death, &c., such transmission shall be authenticated by a declaration, which declaration is to state the manner in which and the party to whom such share shall have been so transmitted, and "such declaration shall be left with the secretary, and thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders." What then is an executor to do, who finds that his testator has died entitled to shares in such a company as this? He may do one of two things. He may leave the shares alone, outstanding in the name of the testator. The consequence would be that he could neither transfer the shares, nor vote in respect of them, nor receive dividends on them, and, though he might be liable for calls, it would only be in his representative capacity. I do not see how the company could force him to have his name put on the register. On the other hand the executor may want to deal with the shares or to receive dividends in respect of them. If so he must avail himself of the machinery given by the 18th section, and procure himself to be registered as a shareholder. Here the executors sent in the probate of the will to the company, obviously for the purpose of

putting themselves in a position to receive the dividends; and they could not by the express terms of the section have carried out that object, unless they had got themselves registered under the section. Once registered under it they clearly become shareholders, and the company have nothing to do with the character in which they hold the shares, whether as executors or trustees. That being so, if one of them forges the signature of the other to a transfer what is the legal effect of such a transfer? It is altogether invalid. This appears to me to be the true solution of the question, which does not in my opinion present much difficulty when once the provisions of the Companies Clauses Act are understood. I will not say whether the same result would follow in the case of a company governed by another Act of Parliament. So far as this particular Act is concerned, I think the law of the matter is clear. I was somewhat struck at first by the point raised by the defendants with regard to the last of the forged transfers, but I think that it will be seen that there is nothing in it, when it is remembered that the plaintiffs in this action are really asserting a legal title. With regard to the suggestion of an estoppel, there appears to me to be no ground for it whatever.

LOPES, L.J. I will add but a very few words with regard to the main question, which is one of great importance, viz. the question whether these executors were shareholders in the company. When the provisions of the Act which governs this company are considered, I think the question becomes comparatively easy. Transmissions of shares in this company are regulated by ss. 18, 19, and 20 of the Companies Clauses Act, 1845, but mainly by s. 18. What is the effect of that section? The effect of it is that executors must be themselves registered as shareholders before they can transfer the shares. Whether or no the names of these executors were entered in the stock ledger, which must be treated as the register of shareholders, with or without the addition of the words "as executors" seems to me quite immaterial. I do not think that the addition of those words would qualify the effect of the entry. It appears to me that having regard to the terms of the section they were in fact

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entered as shareholders, and must be regarded as such. For these reasons I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Stephens & Stephens, for H. Hand.*
Solicitor for defendant: *C. H. Mason.*

E. L.

Dec. 4, 5.

STAREY *v.* THE CHILWORTH GUNPOWDER COMPANY.

Trade-mark—Offences — False Trade Description—Application to Goods—Intent to defraud—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-s.* 1.

In order to constitute the offence of applying a false trade description to goods with intent to defraud, within the meaning of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, sub-s. 1, it is not necessary that there should be any fraud in the sense of an intent to supply a worthless or inferior article, but it is sufficient that an article is intended to be supplied of a different description from that which the customer intends to purchase and believes he is purchasing.

The respondents, who were manufacturers of gunpowder, entered into a contract with the Government to supply powder. Owing to an accident they were unable to manufacture the powder themselves, and in order to carry out their contract they bought German powder, and put it into barrels supplied by the Government, and put labels upon the barrels containing their own name and a description applicable to the powder of their own manufacture which they would have delivered if they had not been prevented by the accident. The powder so delivered was, in fact, equal in quality to powder of the respondents' own manufacture, but no indication was given that the powder was of German manufacture:—

Held, that the respondents were guilty of the offence of applying a false trade description to goods within the meaning of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, sub-s. 1 (*d*), and that they had acted with intent to defraud within the meaning of s. 2, sub-s. 1 (*f*), and were liable to be convicted.

CASE stated by justices.

An information was laid by the appellant, John Starey, secretary of the Trade-mark Owners Mutual Protection Association, Limited, for that the respondents, the Chilworth Gunpowder Company, Limited, did unlawfully apply or cause to be applied a false trade description, to wit, the letters, figures and words,

"Gunpowder Chilworth G. P. Co. Ltd. R. L. G. 4." to goods, namely gunpowder, contrary to the statute 50 & 51 Vict. c. 28, s. 2.

The justices dismissed the information, and stated the following case for the opinion of the Court.

Upon the hearing of the information the following facts were proved:—

The respondents were an English company, limited by shares, and registered under the Joint Stock Companies Acts, 1862 to 1886. They were manufacturers of gunpowder, and had mills at Chilworth, in Surrey and at Fernilee, in Derbyshire, and they had general offices in the city of London.

In May, 1888, the respondents entered into a contract with Her Majesty's Government for the supply of 5000 barrels of gunpowder of a description known as R. L. G. 4 (Rifle Large Grain No. 4).

The contract contained stipulations that the gunpowder should be delivered on certain specified dates, and that in default of delivery on such dates the respondents should be liable to a fixed penalty of 2½ per cent., and to be charged with the difference in price if the Government should buy in gunpowder elsewhere. There were no stipulations in the contract that the gunpowder should be of the respondents' own manufacture, or that it should be of English manufacture, and it was proved that in other contracts between the respondents and the Government such express stipulations were inserted.

The respondents were manufacturers of the kind of gunpowder mentioned in the contract, and at the time of making such contract they intended to manufacture the gunpowder which they had agreed to supply. They were prevented, however, from carrying out such intention by two explosions which took place at their mills, whereby the mills were for the time being rendered useless for the manufacture of gunpowder.

The Government pressed for the delivery of the gunpowder, and in order to fulfil their contract the respondents made arrangements with a German firm, and imported the whole of the gunpowder from Germany in cylinders which bore labels marked "Manufactured in Germany." By reason of their having to import the

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gunpowder for the purposes of the contract the respondents sustained a loss of 3*s.* or 4*s.* per barrel.

Upon receiving the gunpowder at their mills at Chilworth, the respondents took it out of the cylinders and placed it in barrels supplied to them by the Government, according to a provision in the contract that the gunpowder should be delivered in barrels supplied by the Government for that purpose. The respondents affixed to each of such barrels the following label :—

"Gunpowder
110 lbs.
Chilworth Gunpowder Co. Ld
R. L. G 4
March 1889
Bag Waterproof
Lot 179
T R 28."

The label was in the form which the Government prescribed for their barrels containing powder, the words "Chilworth Gunpowder Co. Ld." being inserted in the place where the name of the contractor was required to be inserted.

There was no indication upon the label or otherwise on the barrels that the gunpowder was of German manufacture, but the description of the gunpowder was accurately stated as R. L. G^4, and it was equal in quality to powder of that description manufactured by the respondents.

The gunpowder was accepted by the Government in fulfilment of the contract, without complaint that it was inferior in quality or that it did not answer the description of gunpowder contracted for; but it was admitted that no communication was made to the Government, upon delivery or otherwise, that the gunpowder was of German manufacture.

Upon the facts aforesaid the justices found that the label was not a false trade description within the meaning of the statute, and that there had been no intent to defraud on the part of the respondents, and they therefore dismissed the information.

The question for the opinion of the Court was, whether upon the facts aforesaid the justices ought to have convicted the respondents. If the Court should be of the opinion that the

justices were right in dismissing the information the order dismissing the information was to stand. If the Court should be of opinion that the justices ought to have convicted the respondents, the Court was asked to remit the case to the justices, with the opinion of the Court, or to make such other order as the Court should think fit.

Moulton, Q.C., (*R. McKenna*, with him), for the appellant. On the facts as found by the magistrates the respondents ought to have been convicted. They were guilty of applying a false trade description to goods within the meaning of 50 & 51 Vict. c. 28, s. 2, sub-s. 1 (*d*). (1) It cannot be said that the respondents have proved that they acted without intent to defraud. What they did amounted to an attempt to pass off on the Government German powder as being powder of their own manufacture.

Poland, Q.C. (*R. S. Wright*, with him), for the respondents. The magistrates were right in refusing to convict. The finding, in the last paragraph but one of the case, that the label was not a false trade description within the meaning of the statute, and that there had been no intent to defraud on the part of the respondents, is a conclusive finding of fact, which disposes of the case in favour of the respondents. It would have been impossible to find any intent to defraud, having regard to the fact that the powder delivered by the respondents was equal in quality to powder of their own manufacture. [He referred to *Gridley* v. *Swinborne*. (2)]

[MATHEW, J., referred to *Johnson* v. *Raylton*. (3)]

Moulton, Q.C., was not called upon to reply.

(1) 50 & 51 Vict. c. 28, s. 2, sub-s. 1: "Every person who . . . . (*d*) applies any false trade description to goods . . . . shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act."

By s. 3, sub-s. 1: "The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade-mark, or part of a trade-mark, shall not prevent such trade description being a false trade description within the meaning of this Act."

(2) 52 J. P. 791.

(3) 7 Q. B. D. 438.

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LORD COLERIDGE, C.J. This case raises an important point, and on consideration I am of opinion that it is not necessary to send the case back to the magistrates to be re-stated or amended. The case states in substance that the respondents had a contract with the Government to supply gunpowder of the description known as "R. L. G. No. 4," of which they were manufacturers. Unfortunately there were two explosions, which damaged the respondents' works to such an extent that they were unable to manufacture the powder which they had undertaken to deliver. The Government was entitled to delivery of the powder, and to penalties in case of failure to deliver, and had the right to buy in against the respondents, and charge them with any loss which might be incurred. There was great difficulty in getting a sufficient quantity of powder in this country to complete the order, so the respondents got powder from Germany, which was labelled as manufactured in Germany, so that it passed through the customs. (1) This powder was as good as the powder which the respondents make themselves. It was put into Government barrels, and was delivered to the Government in fulfilment of the respondents' contract. The question to be decided arises on the label which the respondents affixed to these barrels. That label contains the following words and figures:—

"Gunpowder 110 lbs.
"Chilworth Gunpowder Co. Ld.
"R. L. G. 4.
"March, 1889. Bag Waterproof Lot 179. T. R. 28."

The magistrates have found as follows: "The label is in the form which the Government prescribe for their barrels containing powder, the words 'Chilworth Gunpowder Co., Ld.,' being inserted in the place where the name of the contractor is required to be inserted."

It is obvious that the word "contractor" may mean any one of three things. It may mean, first, a manufacturer who is not a vendor of articles which he does not manufacture himself, or, secondly, a vendor who is not a manufacturer, or, thirdly, a person who is both a manufacturer of goods and a vendor of other goods

(1) 50 & 51 Vict. c. 28, s. 16.

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not manufactured by himself. The word in itself is obscure and ambiguous, and if there had not been in the case enough to shew the meaning in which the word is used, we should have been compelled to send the case back to be re-stated or amended. The respondents are found by the case to be manufacturers, and, in a certain sense, manufacturers only. In this particular instance it is true that they were vendors of articles not manufactured by themselves, but it does not appear that they ever, except upon this one occasion, sold any gunpowder which was not of their own manufacture. When they used this label their meaning must have been that they were manufacturers of the powder in the barrel, which, as a matter of fact, they were not. Therefore within the meaning of the Act they were using a false trade-mark. This view is supported by the decision of Brett and Cotton, L.JJ., forming the majority of the Court of Appeal, in *Johnson* v. *Raylton* (1). It is true that in that case Bramwell, L.J., dissented from the judgment of the majority, but still it is the judgment of the Court of Appeal, and, as there was no appeal to the House of Lords, it appears that the decision must have been acquiesced in. I have arrived at the conclusion that the magistrates were wrong in not holding that what the respondents did was an offence against the Act. In my opinion there was an offence against the Act. This view of the matter, however, does not conclude the case, for, as Mr. Poland has pointed out, assuming that what was done would otherwise amount to an offence against the Act, still by s. 2, sub-s. 1 (*f*), and sub-s. 2 (*a*) (*b*), the respondents cannot be convicted if they prove that they acted without intent to defraud, or that, having taken all reasonable precautions against committing an offence, they had no reason to suspect the genuineness of the trade description, or that they gave all information in their power with respect to the persons from whom they obtained the goods. If they prove any of these facts there is a good defence. It is not necessary to go through all these various provisions. The two sub-sections are pointed at different offences, but the language varies only so far as the subject-matter compels it to vary. In the present case all further controversy is superfluous when once one has ascertained with

(1) 7 Q. B. D. 438.

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certainty what "fraud" means in the Act. I agree that if the word is used in the sense of putting off a bad article on a customer in order to get money unfairly, there is no evidence here of anything of the kind having been done. On the contrary it is expressly found that the article supplied was as good as that which was contracted for. But that I think is not the correct meaning of the word "fraud" as used in this Act of Parliament. The Act is directed against the abuse of trade-marks, and the putting off on a purchaser of, not a bad article, but an article different from that which he intends to purchase and believes that he is purchasing. It would apply to cases where a particular article, manufactured by a particular person, had acquired a wide-spread reputation (as for instance happened in the celebrated case of the fish-sauces (1)), and some one supplied another and a different article under that name, so as to make the purchaser take something which he did not know he was taking. That I think is the meaning of the word "defraud" as used in this Act of Parliament, and in that sense only there was in the present case an intent to defraud. The respondents wanted to save their contract. They were bound to deliver in time, and to deliver "R. L. G. 4," which means English gunpowder. They changed the barrels in which the powder was contained, and put their own name on the labels. This was a false description, used in order to save their contract and avoid the penalties, and any loss which they might incur through the Government buying in against them. They broke their contract in using the trade-mark, and there was an intent to defraud, for what they did was done in order to save their contract, and to make the Government believe that they had an article which they had not. It is urged on behalf of the respondents that the magistrates have found as a fact that there was no intent to defraud; but the question asked in the case is whether on the facts as found the magistrates ought to have convicted, and they could not have meant to ask the Court whether they ought to have convicted persons whom they had found as a fact not to be guilty of an offence against the Act. To ask such a question would be absurd, and I will not impute absurdity to the magis-

(1) *Burgess* v. *Burgess*, 3 De G. M. & G. 896.

trates. If there were a finding of fact to the effect contended for it would be conclusive, and no question would arise on which the opinion of the Court could be asked.

For these reasons I am of opinion that the magistrates were wrong in the conclusion at which they have arrived, and the case must be remitted to them with this expression of the opinion of the Court.

MATHEW, J. I am of the same opinion. I consider the point perfectly clear. The offence with which the respondents were charged was the use of "a false trade description" as defined in this Act of Parliament. It is abundantly proved that the respondents dealt with the Government as manufacturers of gunpowder. In changing the packages and affixing their own labels they must have intended to convey the impression that the article was manufactured by themselves. This is clearly within the definition of "false trade description" in s. 3 of the statute. But Mr. Poland contends that the respondents are protected by s. 2, sub-s. 1 (*f*), because it is proved that they acted without intent to defraud. No doubt there was no intent to palm off inferior goods, but there was an intent to save themselves from the consequences of the accident, and to conceal from the Government the fact that the gunpowder was not of their manufacture. On the fair construction of the Act I am of opinion that the words "intent to defraud" mean more than an intent to cheat a customer. The Act makes a new offence by providing (in s. 2, sub-s. 1) that every person who applies any false trade description to goods shall be guilty of an offence against the Act. The words "without intent to defraud" apply to cases where a person uses a particular mark without any intent in so doing to induce a buyer to accept goods which might otherwise be rejected.

Case remitted.

Solicitors for appellant: *McKenna & Co.*
Solicitors for respondents: *Bircham & Co.*

P. B. H.

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Nov. 7, 8.

LEAK *v.* DRIFFIELD.

Husband and Wife—Married Woman—Contract—Separate Estate—Restraint on Anticipation—Intention to bind—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 3.

In an action against a married woman to recover the price of goods sold and delivered to her it appeared that upon her marriage certain property had been settled upon her to her separate use with a restraint upon anticipation, the income of which she spent in the purchase of clothes for herself and her children, and that at the date of her contract with the plaintiffs she had no separate property free from restraint upon anticipation other than the clothes so purchased:—

Held, that the test of her liability was the possession by her at the date of the contract of free separate property with respect to which she might reasonably be deemed to have contracted; that she could not reasonably be deemed to have contracted with respect to the clothes of herself and her children, and that the plaintiffs were therefore not entitled to recover.

Appeal from the county court judge of York.

The action was brought by a firm of drapers to recover the value of goods supplied to the defendant, a married woman, during coverture. Upon her marriage in 1867, certain property had been settled upon the defendant to her separate use subject to a restraint upon anticipation, and by subsequent agreement with her husband she bought clothes for herself and children out of the income of this separate estate. With the exception of the clothes of herself and children so purchased the defendant was, at the time she ordered the goods, possessed of no separate estate free from restraint upon anticipation. Since the goods had been ordered, and before the commencement of the action, the defendant had been divorced from her husband. The county court judge gave judgment for the plaintiffs, and the defendant appealed.

J. V. Austin, for the defendant. The defendant was not in a position to make any separate estate liable for her contracts under s. 1, sub-s. 3, of the Married Women's Property Act, 1882. The onus is on the plaintiff to shew that a married woman had separate estate at the time of contracting: *Palliser* v. *Gurney* (1);

(1) 19 Q. B. D. 519.

and this onus is not discharged by merely shewing that she had separate property which she was restrained from anticipating: *Harrison* v. *Harrison* (1); it must be shewn that she had free separate estate with respect to which she could contract. The real test is whether a married woman had at the date of the contract free separate estate with respect to which she could reasonably be supposed to have contracted, and it would be unreasonable to hold that she could contract with reference to, and with an intention to bind, her necessary clothing.

J. Scott Fox, for the plaintiffs. The county court judge was right in holding that at the date of the contract the defendant was possessed of free separate property, and that she had failed to shew that she had not contracted with reference to it or so as to bind it. Even before the passing of the Married Women's Property Act, 1882, the fact that a married woman had money in her hands over which she had a power of disposal enabled her to enter into a contract to bind it; and if there was an intention on her part to create an obligation, a Court of Equity would enforce it to the extent of her existing free separate property: *Owens* v. *Dickenson* (2); *Picard* v. *Hine* (3); *Pike* v. *Fitzgibbon*. (4) The Married Women's Property Act, 1882, has not made the liability of a married woman less than it was before; it has established that the test of her liability is whether she was possessed of separate property at the date of the contract. The nature or value of such separate property is immaterial, and the plaintiffs have discharged the onus upon them by shewing that she had separate property. By s. 1, sub-s. 3, of the Act of 1882, the defendant is deemed to have contracted with reference to and so as to bind her separate property, unless the contrary be shewn, which has not been done. There is nothing unreasonable in supposing that, when she was professing to make a separate contract, she contracted with reference to and so as to bind her clothing.

J. V. Austin, in reply. The question is in all cases one of fact; whether the married woman had at the date of the contract any

(1) 13 P. D. 180.
(2) Cr. & Ph. 48.
(3) Law Rep. 5 Ch. 27
(4) 17 Ch. D. 454.

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separate estate with respect to which she could reasonably be supposed to be contracting; and there was no evidence in the present case of the possession by the defendant of any such property. The Act of 1882 has only made two alterations in the previous law as to the contracts of married women: in s. 1, sub-s. 3, it has removed the doubt whether a married woman entering into general engagements bound her separate estate by enacting in effect that she shall bind it if she has separate property with respect to which she may reasonably be deemed to contract; and in s. 1, sub-s. 4, it has enacted that if she has such separate estate, a contract made by her will bind her after-acquired separate property.

[He also cited *London Chartered Bank of Australia* v. *Lemprière* (1).]

MATHEW, J. I am with reluctance compelled to differ from the conclusion at which the learned county court judge has arrived, and regret that I am unable to give effect to the argument on behalf of the plaintiffs. The facts of the case are simple. The plaintiffs are a firm of drapers, who are suing the defendant to recover the price of goods supplied to her during coverture, and the defendant is a woman who was divorced at the date when the action was heard, and is therefore now in the position of a feme sole. The plaintiffs undertook to establish the fact that although the defendant was a married woman at the time when she ordered the goods, she had separate estate which was liable to her engagements. That is how the case shaped itself at the trial. The existence at the date of the contract of separate property restrained from anticipation was shewn, and it was further proved that from time to time the defendant bought clothes for herself and her children out of her income arising from such separate estate; it appeared that beyond this she had no other separate property free from restraint. Upon this state of facts, it was said by the plaintiffs that the defendant's contracts were, under the Married Women's Property Act, 1882, binding upon her ab initio, and that they were enforceable against her separate property. It was suggested that with

(1) Law Rep. 4 P. C. 572.

the quantity or quality of separate property belonging to a married woman at the date of the contract we had nothing to do, that even a wedding ring or her personal clothing would be sufficient to bring her contracts within the Act of 1882, so as to make her after-acquired property liable under s. 1, sub-s. 4, to satisfy her liabilities under her contracts. On the other hand it was contended that no such consequence was contemplated by the legislature, and that the provisions of s. 1, sub-s. 3, of the Act made it clear that the only liability intended to be created was one arising in cases where there was reasonable ground for presuming that the contract was made by the married woman with reference to her separate property. That sub-section provides that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shewn." Now at the time when the defendant entered into the contract she had separate property which was under settlement and subject to a restraint upon anticipation; and, further, she had the clothing of herself and her children, purchased out of the income of her settled property. I do not think that it is enough to shew that a married woman has separate property settled upon her subject to restraint upon anticipation, nor does the mere existence of such property afford a ground for the presumption of the existence of other separate property with respect to which she must be taken to have contracted. *Palliser* v. *Gurney* (1) shews that the onus is on the plaintiff to shew the existence of separate property at the date of the contract. The recent case of *Harrison* v. *Harrison* (2) is a clear authority to shew that a married woman's property is not bound by her contracts unless she can be supposed to have contracted with reference to it. It is true that in that case the married woman's property was inalienable, and, as was said by Fry, L.J., she could not be deemed to have entered into a contract with respect to property which she could not alienate. Applying that judgment to the present case, the question is whether the defendant had separate property with respect to which she could reasonably be deemed to have contracted; and as her only free separate property consisted of the

(1) 19 Q. B. D. 519. (2) 13 P. D. 180.

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clothes of herself and of her children, which they could not do without, it is clear to me that she could not be deemed to have contracted with reference to that separate property.

WILLS, J. I am of the same opinion. Sub-sect. 3 provides that a married woman's contract shall be deemed to be entered into by her with respect to and to bind her separate property unless the contrary be shewn. In this case I think the contrary was shewn. The defendant had originally separate property restrained from anticipation, and no other; and the only free separate property which she acquired was the clothes of herself and her children bought from the income of the property so settled. If so, is it possible to suppose that she entered into a contract under which she was professing to bind her own and her children's clothes? The proposition seems to answer itself; it would be absurd to assume such an intention. It seems to me that if the argument on behalf of the plaintiffs is followed to its logical conclusion, the protection afforded by restraint on anticipation is, to a very great extent, done away with, for there will very rarely be a case in which the wife is not in possession of some scintilla of property bought with her income after it has come to her hands, and so free from restraint. I cannot think that the legislature intended to make such a wide change; to effect such a revolution in the law they would have used the clearest language.

Appeal allowed. Leave to appeal granted.

Solicitors for plaintiffs: *Ridsdale & Son, for G. Crumbie, York.*
Solicitors for defendant: *Crowders & Vizard.*

W. J. B.

[IN THE COURT OF APPEAL.]

1889
Nov. 6.

HOLTBY *v.* HODGSON. BATESON, GARNISHEE.

Husband and Wife—Married Woman—Attachment of Debts—Order XLV., *r.* 1.

Judgment having been signed in an action against a married woman, execution upon which was limited to her separate estate not subject to any restraint upon anticipation, it was sought to attach in execution a sum of money recovered by her as damages in an action against the garnishee, and for which the judge at the trial had directed judgment to be entered for her:—

Held, that the money could be attached.

Held, further, that the fact that judgment in the action against the garnishee was not in fact entered until after the commencement of the garnishee proceedings did not affect the right of the plaintiff to a garnishee order.

APPEAL of the defendant from the judgment of a Divisional Court (Mathew and Cave, JJ.) affirming a garnishee order.

In September, 1887, the plaintiff obtained a judgment by default against the defendant, a married woman; the judgment was in the form laid down in *Scott* v. *Morley* (1), enforceable only against her separate property not subject to any restraint upon anticipation. On July 23, 1889, the defendant obtained a verdict for 150*l.* damages in an action for malicious prosecution brought by her against the garnishee, and the judge at the trial directed judgment to be entered for her for that amount, but judgment was not actually entered or signed by her until the following October. On July 24, 1889, the plaintiff obtained an order nisi to attach the damages recovered by the defendant in her action for malicious prosecution, which was made absolute on July 31; an appeal to Wills, J., at chambers, was referred by him to the Divisional Court, which affirmed the order. The defendant appealed.

Crump, Q.C. (*Cyril Dodd*, with him), for the defendant. The plaintiff is not entitled to a garnishee order. First, the judgment recovered by him against the defendant is not one which can be made the foundation of garnishee proceedings; it is not a judgment against her personally, but only a judgment against her separate estate. The liability of a married woman on her

(1) 20 Q. B. D. 120.

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contracts is not personal, but proprietary, as was pointed out by Bowen, L.J., in *Scott* v. *Morley* (1); she cannot be committed for default in payment of money recovered against her, nor is she, unless trading apart from her husband, subject to the operation of the bankruptcy laws: *In re Gardiner, Ex parte Coulson.* (2)

Secondly, the judgment recovered by the defendant against the garnishee did not create a debt "owing or accruing" to her within the meaning of Order XLV., r. 1. The damages became part of her separate estate, but were not a debt liable to be attached.

Thirdly, there was no debt due from the garnishee when the garnishee proceedings were instituted. Until judgment had been actually entered or signed, there was nothing upon which the proceedings could be taken, for the direction of the judge at the trial that judgment should be entered cannot be taken to have the same effect that an actual entry of judgment would have, although judgment, when entered, would be dated as of the day on which it was pronounced; there was nothing but a verdict in an action for unliquidated damages, and this did not create an existing debt.

[They cited *Palliser* v. *Gurney* (3); *Chapman* v. *Biggs.* (4)]

T. Willes Chitty, for the plaintiff, was not called upon.

LORD ESHER, M.R. Several objections have been taken to the making of this garnishee order. In the first place it is said that the plaintiff had not obtained against the married woman such a judgment as would bring him within Order XLV., r. 1, and entitle him to a garnishee order nisi, and it is said that the judgment was not such a judgment because it was not a personal judgment against the married woman, but only a judgment against her separate estate. Now what the nature of this judgment really is is to be found in *Scott* v. *Morley* (1); it is a judgment against a married woman, and in the present instance it has been obtained by default. Looking at the judgment itself, we find that it follows the claim indorsed on the writ, which was so framed as to enable the plaintiff to obtain a judgment against the defendant

(1) 20 Q. B. D. 120.
(2) 20 Q. B. D. 249.
(3) 19 Q. B. D. 519.
(4) 11 Q. B. D. 27.

similar to that in *Scott* v. *Morley* (1); it is therefore good, for it follows the form laid down in that case. The defendant is a married woman who has contracted certain obligations upon which the law allows her to be sued; she is, it is true, only liable on certain conditions, but those conditions are well alleged in the writ, and the judgment by default is an admission by the defendant that the circumstances and conditions existed necessary to entitle the plaintiff to obtain such a judgment. We therefore have a judgment against the defendant for the recovery of a sum of money and costs, though no doubt they are only payable out of her separate estate and in a certain manner. Is that judgment within Order XLV., r. 1? Looking at the language of that rule, it is clear that the judgment obtained by the person seeking to get a garnishee order must be a judgment against a debtor liable upon it; but it is clear that the defendant is so liable, although the judgment is only realizable in a certain way; all other conditions have been satisfied, and are existing to entitle the master to make this order. We are asked to limit the language of Order XLV. to certain kinds of judgment, but the only limitation in the order itself is that which says that the judgment must be against a person liable under it, and therefore the judgment in the present case comes accurately within the words of that order.

Reliance has been placed in argument upon a phrase in the judgment of Bowen, L.J., in *Scott* v. *Morley* (1), at p. 128, where, in expounding the language of s. 1, sub-s. 2, of the Married Women's Property Act, 1882, the Lord Justice says: "It appears to me that those words, taken in their natural sense, do not create any personal liability; they only subject the married woman to a proprietary liability." I think, however, that the expression "proprietary liability" does not help the defendant much; it is only a short and compendious way of stating the proposition that a judgment obtained against a married woman must be executed against her property and not against her person; such a judgment cannot make a married woman liable to penal consequences, nor can it subject her to the operation of the bankruptcy laws, unless indeed she be carrying on a trade separately

(1) 20 Q. B. D. 120.

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from her husband and be possessed of separate property; nor can any order to send her to prison be made upon it. I am therefore clearly of opinion that this was such a judgment against the defendant as can be made the foundation of a garnishee order.

Secondly, it was said that she had not herself obtained such a judgment against a third person as would make her a judgment creditor of that person: that the only effect of her judgment was to give her something as her separate property. But what is it that the judgment gives her? It is not money, nor is it lands or chattels; the judgment creates a judgment debt which is due to her, and it is only a play upon words to say that she has not obtained a judgment within the meaning of Order XLV., when the person against whom she has obtained judgment owes her the money, and can be made to pay it.

Those were the two main points taken on behalf of the defendant, but others were also raised. It was said that although she had obtained a verdict, and the judge at the trial had given judgment for her, yet that as judgment had not been entered or signed when the garnishee proceedings were commenced, she had at that time no judgment, but only a verdict. That takes us to Order XLI., r. 3, which provides for the date of the entry of judgment. I need only briefly mention the old practice. Under that the parties must necessarily have had a jury, who would give a verdict, which would be entered at nisi prius by the proper officer, and on that entry the nisi prius record would be made up; this, however, was only a step in the proceedings. Upon the nisi prius record the successful party got his costs taxed, and obtained from the taxing master an allocatur, and it was only upon the allocatur that final judgment was signed. Then came the Judicature Act, under which judgment might be obtained at Nisi Prius without the verdict of a jury at all, which indeed was always the only judgment that could be obtained in Chancery proceedings, so that in two out of three cases there was no necessity for the nisi prius record and the subsequent ceremonies; when, therefore, the present practice was originated, there was a very natural desire to make the procedure in the Queen's Bench and Chancery Divisions identical. Now by

Order XXXVI., r. 41, the associate has to enter the findings of fact, and if nothing more than that takes place at nisi prius, if the judge does not direct judgment to be entered, the associate's certificate would be only a certificate of the verdict of the jury. In order, however, to get everything into one form, power is given to the judge at nisi prius to do what he could not have done before, to direct judgment to be entered according to the verdict, which is the same thing as giving him power to give or pronounce judgment. Pronouncing judgment is not entering judgment; something has to be done which will be a record, and so the judgment that the judge has pronounced is the judgment which is to be entered. No subsequent ceremony, no signing of judgment, is now necessary. The language of Order XLI., r. 3, is really very clear. The expression "where any judgment is pronounced by the Court or a judge in court" is intended to contrast with the well-known expression "the Court or a judge" in many other rules, that is to say, to exclude the case of a judge sitting in chambers; and the intention of the rule clearly is that, from the moment when the judge has pronounced judgment, and entry of the judgment has been made, the judgment is to take effect, not from the date of the entry, but from the date of its being pronounced; it is an effective judgment from the day when it is pronounced by the judge in court. It has been desired by the defendant that this rule should be confined to trials by a judge without a jury; but there is nothing in the rule to so limit it, and the whole reason of the thing is the other way.

Upon all the points raised I agree with the judgment of the Divisional Court, and I entirely adopt the phraseology of Cave, J., in his judgment, that, with regard to all her property other than such as has been settled to her separate use with a restraint on anticipation, a judgment debt operates against a married woman just as it would against an unmarried woman.

LINDLEY, L.J. I am of the same opinion. The question is one of some importance, whether a judgment recovered by a married woman can be attached; but I have no difficulty in coming to the conclusion that it can.

The attachment of debts depends entirely upon the provisions

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of Order XLV. What has to be done by a person seeking to bring himself within the provisions of that order? He must prove that he has obtained a judgment against some one, and that there is somebody within the jurisdiction who owes money to his judgment debtor, and upon proof of those facts he is entitled to a garnishee order. Now it has been argued before us that the judgment obtained by the plaintiff is not such a judgment as can be made the foundation of garnishee proceedings; it is said that it does not bind the defendant personally, but only binds her separate estate. This is really very much a question of language. The judgment is that the plaintiff do recover a sum of money against the defendant, but that execution is to be limited to her separate estate not subject to a restraint upon anticipation. Suppose her husband were to die, the restraint would be gone, the judgment would bind her, and execution could be issued upon it. In fact, the judgment is obtained against the married woman, but it is not executed in the ordinary way; execution issues upon it against the only portion of her property which can be got at, her separate estate not specially protected, for the restraint on anticipation operates as long as her husband is alive. It is not true, therefore, to say that the judgment is not a judgment against her, and that point fails.

The next point has less substance in it. It was argued that the judgment obtained by the defendant against the garnishee did not create a debt owing to her which could be attached, but there is no ground for such a contention. It is true that the damages recovered by her were part of her separate estate, but they none the less were a debt due to her, and there is no valid reason why they should not be attached.

As to the point that the garnishee proceedings were commenced too soon, as judgment in favour of the defendant had not then been entered, I will add nothing to the observations of the Master of the Rolls, with which I entirely concur.

LOPES, L.J. I concur. What is the test whether a debt is attachable? That it is owing by the garnishee, and that it is a debt of which the judgment debtor can enforce payment if he desire to do so. Applying that test to the present case, there

can be no doubt that the damages recovered by the judgment debtor were a debt owing by the garnishee to her of which she could have enforced payment, and that they were an attachable debt within the meaning of Order XLV., r. 1.

As to the other point, the plaintiff's judgment was clearly a judgment recovered against a married woman, though only enforceable against her separate estate not subject to a restraint upon anticipation. It is precisely the same as a judgment against an unmarried woman, except that in the case of a married woman there is no personal remedy upon the judgment against her, such as a remedy by committal to prison, and that the judgment cannot be made the foundation of bankruptcy proceedings unless she has by trading separately from her husband brought herself within the operation of the bankruptcy laws, as provided by s. 1, sub-s. 5, of the Married Women's Property Act, 1882. That is the only distinction between a judgment against a married woman in respect of her separate property and a judgment against an unmarried woman; and I am therefore clearly of opinion that this judgment was properly made the foundation of garnishee proceedings.

As to the further point that there was no attachable debt until final judgment had been entered, I entirely agree with the Master of the Rolls, and will only say that Order XLI., r. 3, appears to me to afford a complete answer to the contention.

Appeal dismissed.

Solicitors for plaintiff: *Emmet, Son, & Stubbs.*

Solicitors for defendant: *Clinton & Buckby.*

W. J. B.

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Nov. 21, 22.

PREECE AND OTHERS *v.* HARDING AND ANOTHER.

Municipal Election—Election Petition—Report of Commissioner—Persons reported for Corrupt Practices—Jurisdiction of High Court to deal with Report—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 92, 93, 100—*Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 23, *Sched. III., Pt. II.*

When, after the trial of a municipal election petition, the commissioner has reported persons as having been guilty of corrupt practices, the High Court has no jurisdiction to set aside, or amend, his report upon the ground that the notice prescribed by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, had not been given to the persons so reported.

RULE obtained on behalf of John Phipps and thirty others calling upon H. R. Mansel Jones, Esq., the commissioner appointed to try the late Ledbury Ward, in the city of Hereford, municipal election petition, and the petitioners to the said petition, to shew cause why so much of the schedules of the report of the said commissioner to the High Court in relation to the said petition as contained the names of the applicants should not be struck out, amended, or set aside on the grounds, first, that the applicants before being reported by the election court did not receive any notice as required under s. 38 of 46 & 47 Vict. c. 51 (1), which is incorporated in Part II. of Schedule III. of 47 & 48 Vict. c. 70 (1); secondly, that the applicants were not given an opportunity of being heard by themselves; or, thirdly, of calling evidence in their defence to shew why they should not be reported.

The applicants had been reported by the commissioner as

(1) The Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 23, provides that: "So much of section thirty-eight of the Corrupt and Illegal Practices Prevention Act, 1883, as is set forth in Part Two of the Third Schedule to this Act, shall apply as part of this Act."

46 & 47 Vict. c. 51, s. 38. (1.) "Before a person, not being a party to an election petition nor a candidate on behalf of whom the seat is claimed by an election petition, is reported by an election court . . . . to have been guilty at an election, of any corrupt or illegal practice, the court . . . . shall cause notice to be given to such person, and if he appears in pursuance of the notice, shall give him an opportunity of being heard by himself and of calling evidence in his defence to show why he should not be so reported."

having been guilty of corrupt practices, and it was alleged by them that they had not received the notice required by the Act of 1884, and had not had an opportunity of defending themselves, whereupon this rule was obtained.

R. S. Wright, (*Sir R. Webster, A.G.*, and *Gresham Wells*, with him) for Mr. Mansel Jones. This Court has no jurisdiction to make the order for which the applicants are asking. The Municipal Corporations Act, 1882, by s. 92, sub-s. 6, provides that the election court shall have the same powers and privileges as a judge on the trial of a parliamentary election petition. These powers and privileges are defined in the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 29, which provides that the judge shall have the same powers, jurisdiction and authority as a judge of a superior court, or a judge of assize, or nisi prius. In the Act of 1882, and in the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, there are express provisions as to the power of the High Court in respect of municipal election petitions. Sect. 100, sub-s. 4 of the Act of 1882 gives large powers, but only in respect of interlocutory applications before the hearing: *Ex parte Ayres* (1); and by s. 93, sub-s. 8, an election court may reserve any question of law for the consideration of the High Court. By the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 46, a person reported for corrupt practices might have his disqualification removed on proof that it was procured by perjury; and by s. 54 an appeal to quarter sessions from summary convictions is given. These provisions are however omitted from the Acts under consideration. There being therefore express provisions in these Acts as to the power of the High Court in respect of these petitions, it is clear that the legislature did not intend that there should be any kind of appeal except in the cases expressly provided for. There is no machinery provided for raising any such question as this after the decision of an election court, and this Court has no jurisdiction to entertain this application.

[*Reg.* v. *Mayor of Maidenhead* (2); *Stevens* v. *Tillett* (3); *Reg.*

(1) 54 L. T. 296.

(2) 9 Q. B. D. 494.

(3) Law Rep. 6 C. P. 147.

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v. *Price* (1); *Reg.* v. *Holl* (2), and *Ex parte Fernandez* (3), were also cited.]

Lewis Coward, for the petitioners.

Channell, Q.C. (*Gwynne James*, with him), for the applicants. If the notice required by s. 38 of the Act of 1883, as set out in Sched. III. Pt. II. of the Act of 1884, was not given to the applicants the election court had no jurisdiction to report them as having been guilty of corrupt practices, for they were not in any way before the court. The election court is, by s. 100, sub-s. 4, of the Act of 1882, in effect made a branch of the High Court, and this Court can therefore set right any mistake made by the election court in the exercise of its powers. The election petition proceeds as an ordinary action, and this application is one which could be properly made to this Court in an ordinary action. The prescribed notice was not given to the applicants, and this Court has power to correct the mistake which has been made by the election court.

MATHEW, J. In this case the Lord Chief Justice desires that I should state the opinion of the Court.

The rule must be discharged. It has been admitted by the applicants that the Court possesses no appellate jurisdiction whatever over the commissioner, and therefore it seems to follow that, if the commissioner has said that certain persons shall be scheduled upon any ground, we are not entitled to inquire upon what evidence he proceeded. It has, however, been ingeniously argued by Mr. Channell, that, having regard to s. 100 of the Act of 1882, the commissioner is practically constituted a branch of the High Court, and that he is to be treated as if he were exercising functions delegated to him by the High Court, and that, inasmuch as he has exceeded that which he was delegated to do, it is for this Court to correct his mistake. This is, however, an application to this Court to exercise functions which I have never known it to exercise. There is no reason to conjecture from anything that appears in any of the Acts which have been referred to, that it was ever intended that we should treat the

(1) Law Rep. 6 Q. B. 411. (2) 7 Q. B. D. 575.
(3) 10 C. B. (N.S.) 3.

commissioner as a branch of the High Court, or exercise any supervision whatever over him.

If we have no right to review his decision upon any of the very important questions of fact intrusted to the decision of the commissioner, it cannot be supposed that it was ever intended that there should be reserved to us the power of reviewing his decision upon such a matter as this. That being so, we are not called upon to go into the questions of fact whether or not there was evidence in this case upon which he might have acted. We deal with the case upon the assumption that no notice was given to these persons, in order to decide the question of our jurisdiction, and I am satisfied that we have no such jurisdiction as has been appealed to in this case. The rule must be discharged with costs.

Rule discharged.

Solicitors for applicants: *Thomas White & Sons, for Garrold, Hereford.*

Solicitors for petitioners: *Merediths, Roberts, & Mills.*

Solicitor for the Commissioner: *Solicitor to the Treasury.*

W. A.

CHAMBERLAIN *v.* STONEHAM.

Nov. 4.

Witness—Solicitor—Bankruptcy Court Allowance—Action for—Bankruptcy Rules, 1886, *r.* 71—*County Court Rules*, 1889, *Order* L., *r.* 16—*Appendix, Scale.*

By the Bankruptcy Rules, 1886, r. 71, "any witness (other than the debtor) required to attend for the purpose of being examined, or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court," and by the County Court Rules, 1889, Order L., r. 16, the costs of witnesses may be allowed, and their allowance for attendance shall not exceed the highest rate of the allowances mentioned in the appendix.

A solicitor having been summoned as a witness before the registrar of a county court in a bankruptcy proceeding and having received only his travelling expenses, brought an action against the official receiver by whom he was summoned for the amount allowed by the appendix to a professional witness:—

Held, that he was entitled to recover.

APPEAL from Shoreditch County Court.

Action by the plaintiff against the official receiver in bank-

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ruptcy of the estate of Berger, a bankrupt, to recover the sum of 1*l.* 10*s.*, the costs of the plaintiff as a witness. It appeared that the plaintiff had been summoned by the official receiver to attend before the registrar of the Barnet County Court to give evidence and produce documents relating to the affairs of the bankrupt, and the plaintiff had been paid 3*s.* 6*d.* for travelling expenses. He attended before the registrar pursuant to the summons, and before being sworn demanded the usual allowance of expenses.

The registrar decided that the sum of 3*s.* 6*d.* already paid was sufficient. The plaintiff gave his evidence, and afterwards brought the present action. The county court judge held that the plaintiff could not recover, and gave judgment for the defendant. The plaintiff moved to set aside the judgment and enter judgment for the plaintiff.

R. S. Wright, for the plaintiff. By the Bankruptcy Rules, 1886, r. 71, a witness shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court. The plaintiff would be entitled at a trial in court to an allowance under the County Court Rules, 1889, Order L., r. 16, Appendix, Scale, as a "professional man" from 15*s.* to 1*l.* 1*s.* for loss of time.

The county court judge acted on the authority of *Collins* v. *Godefroy* (1), a case in which it was held that an attorney who has attended on subpœna as a witness in a civil suit could not maintain an action against the party who subpœnaed him for compensation for loss of time. But there was then no such scale of allowance for witnesses as in the County Court Rules, 1889; and since the Rules made under the Common Law Procedure Act, 1852, which contained a scale of allowances, it has been the practice to allow for loss of time. In *Hale* v. *Bates* (2) the only claim was in respect of loss of time by a witness who was a solicitor. The master taxed off a part of the claim, and the Court held that the witness had a right to recover the amount taxed off from the defendant by whom he was subpœnaed.

An auctioneer summoned to give evidence before a special examiner in Chancery is as a professional witness entitled to a

(1) 1 B. & Ad. 950. (2) E. B. & E. 575; 28 L. J. (Q.B.) 14.

guinea a day for loss of time together with travelling expenses: *In re Working Men's Mutual Society.* (1)

Mattinson, for the defendant. First, the plaintiff should have pursued the course taken in the case last cited, by refusing to give evidence, when the matter would have been reported to the judge of the county court in whose discretion the costs were: 46 & 47 Vict. c. 52 (Bankruptcy Act, 1883), s. 105. Secondly, at common law a witness was not entitled to sue for more than his actual expenses, and could not recover for loss of time: *Collins* v. *Godefroy.* (2) In that case, as in this, it was argued that there was a well-established practice in the master's offices to allow a professional witness for loss of time, and that, therefore, an implied contract to pay for it arose from a request to give evidence. But Lord Tenterden, C.J., said (3) "that practice cannot alter the law." The scale now existing is only equivalent to the practice existing when *Collins* v. *Godefroy* (2) was decided. That case has never been overruled. It was distinguished in *In re Working Men's Mutual Society* (1), for there the witness had pursued the right remedy by refusing to give evidence unless he was paid his demand, and the question was brought before the judge of the court in which it arose.

R. S. Wright, in reply.

HUDDLESTON, B. I am of opinion that the plaintiff is entitled to judgment. He claims to be entitled by statute to his costs of attending as a witness. By the Bankruptcy Rules, 1886, r. 71, "Any witness (other than the debtor) required to attend for the purpose of being examined, or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court," and by the County Court Rules, 1889, Order L., r. 16, and the scale in the Appendix, the rate of the allowances to witnesses is prescribed. Under these Rules the plaintiff would be entitled to recover without difficulty. But *Collins* v. *Godefroy* (2) is relied upon by the defendant. In that case, however, it was not suggested that except from usage the plaintiff was entitled to any

(1) 21 Ch. D. 831.

(2) 1 B. & Ad. 950.

(3) 1 B. & Ad. at p. 957.

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expenses. The statute of Elizabeth, 5 Eliz. c. 9, s. 12, subjecting a person to a penalty who, if summoned as a witness with a tender of a reasonable sum for his costs and charges as with regard to distance was necessary, did not appear, was cited. The Court held that there was no presumption that a witness was entitled to compensation for loss of time, and that there was no consideration for the alleged promise, even although the defendant had promised to pay the expenses of the witness. That is very different from this case, in which the plaintiff's right to recover is based on the Bankruptcy Rules, and Rules of the County Court. In *Hale* v. *Bates* (1) the question as to the allowance of a witness was brought fully before the Court, and *Collins* v. *Godefroy* (2) was examined, but was not acted on, and so in *In re Working Men's Mutual Society.* (3)

We think that the judgment of the county court judge was wrong, and the plaintiff is entitled to his costs, from 15*s.* to 1*l.* 1*s.*, and the case must go back to the county court judge to assess the exact amount unless the parties agree on it to save expense.

STEPHEN, J. I am of the same opinion. There is no connection between the case of *Collins* v. *Godefroy* (2) and this case, because the right which a person has to an allowance as a witness is now statutory, being founded on the Bankruptcy and County Court Rules.

Judgment for the plaintiff.

Solicitor for plaintiff: *V. J. Chamberlain.*
Solicitor for defendant: *Ernest Todd.*

J. R.

(1) E. B. & E. 575; 28 L. J. (Q.B.) 14.
(2) 1 B. & Ad. 950.
(3) 21 Ch. D. 831.

[IN THE COURT OF APPEAL.]

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Oct. 26.

THE GUARDIANS OF THE POOR OF THE WEST DERBY UNION, APPELLANTS; THE GUARDIANS OF THE POOR OF THE ATCHAM UNION, RESPONDENTS.

Poor Law—Settlement—Derivative Settlement—Child under Sixteen—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

In determining the settlement of a pauper under the age of sixteen the father's settlement could not be ascertained, and it could not be shewn what settlement the pauper derived from his mother without inquiring into her derivative settlement:—

Held, following the interpretation put on s. 35 of the Divided Parishes Act, 1876, in the House of Lords, in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (14 App. Cas. 465), that the prohibition in that section as to inquiry into the derivative settlement of a parent had no application to the case of children under the age of sixteen, and did not prevent the inquiry as to the mother's settlement.

APPEAL from a judgment of the Queen's Bench Division on a case stated on an appeal to quarter sessions for the county of Salop against an order dated July 30, 1886, adjudicating the settlement of Arthur John Helme, a pauper lunatic, to be in the appellant union.

1. The pauper is the legitimate son of E. W. Helme, deceased, and Mary Elizabeth his wife, and was born on October 16, 1873, in the township of Everton in the West Derby Union.

2. E. W. Helme, who died in or about the year 1877, never gained any settlement in his own right, and his birth settlement cannot be ascertained.

3. The pauper's mother, Mary Elizabeth Helme, was born in the parish of Llandisilio, in the Llanfyllin Union, in the county of Montgomery, on May 29, 1841.

4. Mary Elizabeth Helme was the daughter of one Richard Roberts, who in or about 1847 acquired a settlement by renting a tenement in the parish of Llandrinio in the Llanfyllin Union, and paying all rates and taxes for the same, which he occupied until the year 1879.

5. Mary Elizabeth Helme lived with her father as part of his family until she was sixteen years of age, when she left her home and went to service, and did not subsequently and up to the time

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of her marriage with E. W. Helme in the year 1865 acquire any settlement in her own right.

6. Mary Elizabeth Helme has not gained any settlement in her own right since her husband died.

7. The appellants contend that the order ought not to have been made, and that the pauper is settled in the parish of Llandisilio in the Llanfyllin Union, in right of his mother's birth settlement.

8. The respondents contend that it cannot be shewn what settlement the pauper has derived from his mother without inquiring into her derivative settlement, and that as he has not acquired a settlement for himself, he must be deemed to be settled in the township of Everton in the appellant union, in which he was born.

The Court were to have power to draw inferences of law and fact.

Sect. 35 of the Divided Parishes Act, 1876, is as follows:—

"No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

The case came before a Divisional Court, which decided, on the authority of *Reg.* v. *Guardians of Marylebone* (1), in favour of the respondents, and affirmed the order of justices. This was an appeal against the judgment of the Queen's Bench Division.

(1) 13 Q. B. D. 15.

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Jelf, Q.C. (*F. Marshall*, and *Rohrweger*, with him), in support of the appeal. The pauper was under sixteen, and as the settlement of the father cannot be ascertained, the pauper took his mother's settlement under the 1st clause of the section and retains it. There is nothing in the 3rd clause of the section to affect the question as it applies to children after they have attained the age of sixteen. This is the decision of the House of Lords in *Guardians of Reigate Union* v. *Guardians of Croydon Union*. (1)

Bowen Rowlands, Q.C., and *R. Cunningham Glen* (*Poland, Q.C.*, with them), for the respondents. It was not necessary for the decision of the case in the House of Lords to determine what is the construction of the 3rd clause of the section. Lord Watson's view, that it applies only to children above sixteen (2), was not necessary to the decision of the cases before him, and is a dictum which does not bind this Court. It does not appear that it was adopted by the other members of the House, and it is inconsistent with the view taken by Lord Macnaghten, that the section applies where there is an independent inquiry into the settlement of the child, since such independent inquiry may take place whether the child is under or over sixteen. If this Court takes the view that the case is governed by the decision of the House of Lords, the order appealed against cannot be supported; but it is submitted that this Court is free to decide according to its previous decisions. If so, *Reg.* v. *Guardians of Marylebone* (3) and *Guardians of Headington Union* v. *Guardians of St. Olave's Union* (4) are in favour of the respondents.

LORD ESHER, M.R. The question is, what is the true construction of the 35th section of the Act of Parliament which is before us, and, when we have got at the true construction, what is the application of it to this case? With regard to the construction of this section, a great many Courts have considered it, and a great many judges have had different opinions about it. That being so, this Court expressed a hope, as we were told that several cases were going to the House of Lords, that the House of Lords would construe the whole section, so that we might know what their view of the true construction was. The House

(1) 14 App. Cas. 465.
(2) 14 App. Cas. at p. 484.
(3) 13 Q. B. D. 15.
(4) 13 Q. B. D. 293.

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of Lords heard the cases, and did not give judgment at once, but considered the matter carefully, and four of the learned judges in the House of Lords gave judgment. Now we know that each of them considers the matter separately, and they then consider the matter jointly, interchanging their judgments, so that every one of them has seen the judgments of the others. If they mean to differ in their view, they say so openly when they come to deliver their judgments, and if they do not do this, it must be taken that each of them agrees with the judgments of the others.

We have then four judgments. The most elaborate of these is, no doubt, that of Lord Watson; but Lord Watson's judgment must have been read by the Lord Chancellor, and the Lord Chancellor must have discussed with Lord Watson whether he agreed with it or not, and he must have agreed with it. Lord FitzGerald in terms, says, "I have read the judgment of Lord Watson, and I agree with it;" that is, he agrees not only with the result but with the mode in which the result is arrived at. Lord Macnaghten had read Lord Watson's judgment, and he does not attempt to express the smallest difference of opinion about it; he adopts the reasoning of Lord Watson and agrees with it, but he adds another reason of his own.

What is important to-day is what is the view taken by the House of Lords of the interpretation of the third part of the 35th section. It is plain that Lord Watson has taken a distinct and clear view, and has stated it clearly, of what is the effect, to a certain extent at all events, of the third clause. He says, in terms, that the third clause only applies to the case of children above sixteen, and does not apply to the case of children under sixteen. The case of children under sixteen is dealt with by the two first paragraphs. The third paragraph does not deal with the case of settlement, or removal, or chargeability with regard to children under sixteen. It is admitted if we adopt that view, then this case must be decided according to the contention of the appellants; but it was said that we were not bound by that view of Lord Watson, because it was not necessary for the decision of the three cases before him. I think it would be wrong of this Court after asking for the interpretation of the House of Lords on the whole section, and after that House has construed the section,

to disregard that construction on the ground that it was not necessary for the decision of the actual case. I cannot do that, and therefore I bow to the decision of the House of Lords, and look upon it as governing what the interpretation must be. I do not ask myself whether I agree with their reasons or not, as that is immaterial. I am clear that they decided the point which is before us: that Lord Watson's judgment deals with it most specifically, that that judgment is really agreed with by the Lord Chancellor and by Lord FitzGerald, and by Lord Macnaghten, but that Lord Macnaghten has also given another reason for coming to the same conclusion. That construction binds us; and under those circumstances it is admitted this appeal must succeed.

LINDLEY, L.J. I am of the same opinion.

It must be borne in mind that before those cases went to the House of Lords the decisions were by no means easy to reconcile. Very few modern Acts of Parliament have been more discussed than this, and the House of Lords having before it three cases, delivered judgment in all three at one time for the purpose of putting an interpretation upon this Act of Parliament which should operate as a guide to us and to others. It would be wrong, in my opinion, not to carry into effect that interpretation so put by the House of Lords upon the statute, and I do not think in future it will be thought to be of any use to fall back upon the earlier decisions, many of which are extremely difficult to reconcile with each other.

The interpretation put by the House of Lords must be, and, indeed, ought to be, the guiding interpretation, and, adopting that view, it is obvious that this appeal must be allowed.

LOPES, L.J. I am clearly of opinion that this case is governed by the decision of the House of Lords.

Appeal allowed.

Solicitors for appellants: *Sharpe, Parkers & Co., for Cleaver, Holden & Co., Liverpool.*

Solicitors for respondents: *Paterson, Snow & Co., for J. Hawley Edwards, Shrewsbury.*

A. M.

1889
Nov. 20.

GUARDIANS OF MITFORD AND LAUNDITCH UNION *v.* GUARDIANS OF WAYLAND UNION.

Poor Law—Settlement—Pauper aged Sixteen—Residence with Father—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35; *Removal Acts*, 9 & 10 *Vict. c.* 66, *s.* 3; 11 & 12 *Vict. c.* 111, *s.* 1.

A child after living in the appellant union with its father, who had acquired a settlement by residence there under 39 & 40 Vict. c. 61, s. 35, removed with him into the respondent union, and while residing there with him attained the age of sixteen and became chargeable to that union.

An order was made for the removal of the child to the appellant union. At the date of the order the father had resided for a year in the respondent union so as to be irremoveable:—

Held, that, notwithstanding the effect of 39 & 40 Vict. c. 61, s. 35, as to the settlement of a child of sixteen, the provisions of the 11 & 12 Vict. c. 111, as to removal applied, and, the father not being removeable, the child was not removeable.

Case stated by quarter sessions in an appeal against an order for the removal of Jane Neville, a pauper, from the Wayland Union (herein called the respondent union) to the Mitford and Launditch Union (herein called the appellant union).

The pauper was the legitimate daughter of John Neville, and was born February 29, 1872. He resided in the parish of Shipdham, in the appellants' union from July, 1874, to October, 1887, without a break and without relief, and thereby acquired a settlement by residence in Shipdham.

On October 11, 1887, he removed to the parish of Hockham in the respondent union, in which parish he had since resided and was residing. On August 13, 1888, the pauper became chargeable to the respondent union in consequence of paralysis, and relief was given to her in her own name. She was then over sixteen years of age. She had always up to the time of becoming chargeable resided and was residing with her father as part of his family. The order of removal was made on October 24, 1888. At that date the pauper's father had resided in the parish of Hockham for twelve months in such a manner as to render him irremoveable from the respondent union.

The quarter sessions determined that the pauper being unemancipated was a child within s. 1 of 11 & 12 Vict. c. 111, and

that she had no other settlement than that of her father, with whom she resided, and that she was therefore irremoveable, and that the order for removal must be quashed.

The question was whether the pauper was or was not removeable from the respondent union.

H. D. Greene, Q.C. (*Thorne*, with him), for the respondents. The pauper had attained the age of sixteen. She had a settlement in the Mitford Union and should be removed there. By the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 35, derivative settlements with certain exceptions are abolished. Formerly an unemancipated child took its father's settlement, but, as Lord Watson said in *Reigate Union* v. *Croydon Union, &c.* (1): "So far as it concerns the settlement of lawful children, the clause introduces a very important alteration of the law. It puts an end to all nice questions as to emancipation or non-emancipation, by enacting that, on attaining the age of sixteen, every child shall, without regard to its physical or mental capacity, cease to follow its parents' settlement, and become capable of acquiring a settlement in its own right."

The status of irremoveability was first given by 9 & 10 Vict. c. 66, s. 1, enacting that no person shall be removed from any parish in which such person shall have resided for five years,—by subsequent legislation the period is reduced to one year. There is a proviso, repealed but in substance re-enacted by 11 & 12 Vict. c. 111, s. 1, as to the non-removal of children having no other settlement than that of their parent. But that applies to unemancipated children only, as *Reg.* v. *St. Mary Arches, Exeter* (2) seems to shew. Some limitation must be put on the word "child." Sect. 3 of 9 & 10 Vict. c. 66, provides that no child under sixteen residing with its father &c. shall be removed. It is, however, silent as to a child over sixteen, who may, therefore, be removed. That section is superfluous if the contention for the appellants is correct. At the date of the relief given both the father and daughter were removeable; at the date of the order he had become irremoveable by reason of residence, but she had not, because of having had relief.

(1) 14 App. Cas. 465, at p. 482. (2) 31 L. J. (M.C.) 77.

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GUARDIANS OF MITFORD AND LAUNDITCH UNION v. GUARDIANS OF WAYLAND UNION.

Reg. v. *St. Olave's* (1), which may be cited for the appellants, was prior to the Act of 1876 and the recent decision in the House of Lords, and was the case of an unemancipated child with no settlement of her own, and therefore the Court held her to be removeable.

Poland, Q.C. (*Morton Smith*, with him), for the appellants. The question is one of irremoveability, a status arising from 9 & 10 Vict. c. 66, s. 1. The proviso to that section was that "whenever any person shall have a wife or children having no other settlement than his or her own such wife and children shall be removeable whenever he or she is removeable, and shall not be removeable when he or she is not removeable." So even where a child acquired a status of irremoveability by residence it was to go with its parent in order that the family might not be separated. But doubts having been entertained by reason of the generality of the proviso it was repealed by 11 & 12 Vict. c. 111, s. 1, which provided "that whenever any person should" (sic) "have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place from which he or she would be removeable . . . and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision" in the former Act. The status of the child is not the same as the status of the parent unless they have the same settlement. When, as in the present case, they have the same settlement, the child is irremoveable if the parent is irremoveable.

Sect. 3 of the 9 & 10 Vict. c. 66, relates to children under sixteen, who may or may not have the same settlement as the head of the family. There were cases under the old poor law of children under sixteen gaining settlements by apprenticeship and otherwise. Sect. 3 was intended to prevent the separation of such children from the parent. Under that section they must be residing together, whereas the proviso in s. 1 applies if they are only residing in the same parish. That the law was beyond question on the point up to the Divided Parishes Act is clear from *Reg.* v. *St. Mary Arches, Exeter.* (2) But the respondents argue that the law is changed by reason of 39 & 40 Vict. c. 61, s. 35, and

(1) Law Rep. 9 Q. B. 38. (2) 31 L. J. (M.C.) 77.

rely on the words as to a child under sixteen, "which child shall take the settlement of its father . . . . up to that age, and shall retain the settlement so taken until it shall acquire another." If the child is to retain the settlement of its father why not also his status of irremoveability? It is said that according to the recent decision of *Reigate Union* v. *Croydon Union* (1) the period of unemancipation ceases at the age of sixteen, and that is so for some purposes. The legislature, in order to get rid of many questions and decisions as to when a child should cease to derive a settlement from its parents, enacted that the settlement of the child should only follow the settlement of the father until the child was sixteen. But the provision deals with settlement only, and not with the status of irremoveability. Up to sixteen the child takes the settlement of the father, and at sixteen keeps it. The 9 & 10 Vict. c. 66, and 39 & 40 Vict. c. 61, may be read together consistently.

The policy of the poor-law has always been opposed to the separation of families.

H. D. Greene, Q.C., in reply.

LORD COLERIDGE, C.J. I am of opinion that the appellants at quarter sessions are entitled to our judgment. The facts are shortly these: The father having acquired a settlement by residence in the appellant parish, then moved into the respondent parish, and at the time of the order appealed from had acquired a status of irremoveability (though not a settlement) in that parish. He had a child, the subject of the present order and appeal. That child, having lived with the father during the whole time he was living in the appellant parish, had, at all events, acquired *his* settlement, and by 9 & 10 Vict. c. 66, and 11 & 12 Vict. c. 111, she had also acquired a status of irremoveability in the appellant parish. She left the appellant parish and came to live in the respondent parish, and before the order appealed from was made, and before her father had acquired a status of irremoveability in the respondent parish, she attained the age of sixteen years. These are the only facts necessary in the consideration of this case.

(1) 14 App. Cas. 465.

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GUARDIANS OF MITFORD AND LAUNDITCH UNION v. GUARDIANS OF WAYLAND UNION.

Lord Coleridge, C.J.

The policy of the poor law is opposed to the separation of members of a family, and 9 & 10 Vict. c. 66, and 11 & 12 Vict. c. 111, were passed in furtherance of that policy. If the present case had arisen before the Divided Parishes Act of 1876 it could not have been disputed that the child would have been irremoveable, because her father, by reason of his residence for a year in the respondent parish, was irremoveable. That statute, 39 & 40 Vict. c. 61, s. 35, in order to get rid of difficult and embarrassing questions which arose as to when the legal consequence or status known to the Courts—although not in terms described by the legislature—as "emancipation" should take place, in substance enacted that at the age of sixteen a person should be emancipated. It has been very ingeniously argued for the respondents that this Act has gone contrary to the previous law and to the principles repeatedly laid down as to the removal of children of sixteen. But it has been satisfactorily pointed out that these statutes may well stand together. The Act of 1876 does put an end to questions of emancipation. For the purpose of emancipation, and for that purpose only, it does fix a time at which emancipation shall take place, and, if no other Act intervenes, it is plain that an emancipated child becoming chargeable must be sent back to its settlement if it has any. But the Act of 1876 does not repeal the earlier Acts which created the status of irremoveability.

The question before us arises on the Acts creating the status of irremoveability. They do not deal with the question of settlement, but with the status of irremoveability which in many cases does not affect settlement at all. We are dealing with a statute for the first time creating a status, and annexing to it as an incident that it shall affect children whatever their settlement may be, and when we know that at the date of the Act a child might acquire a settlement even before it was of an age really able to live apart from its parent, and consequently when (although it had acquired a separate settlement) it might nevertheless be a member, for all practical purposes, of the father's family, and we find, notwithstanding that state of things, that s. 3 had a complete and useful operation to prevent the removal of such child from its parents, and that the provisions as to removal are left

unrepealed by the Act of 1876, which deals only with settlements, I come to the conclusion without any difficulty that the enactments are quite consistent, and that the child is within the provisions of 11 & 12 Vict. c. 111, and the quarter sessions were right in holding that under these circumstances the child was irremoveable, and their judgment must be affirmed.

MATHEW, J. I am of the same opinion. The construction of s. 35 of the Act of 1876 which we are invited by the learned counsel for the respondents to adopt would involve us in the abrogation of the well-established rule that families must not be separated. The earlier statutes clearly indicate that intention of the legislature. Nothing would have been more easy than to have expressed a different intention if the legislature had desired to do so. But the Act of 1876 is silent on the subject of repeal. We ought therefore to construe the statutes together, if we can do so consistently. There is no difficulty whatever if we treat the Act of 1876 as dealing with settlement in the strict sense of the term, and the earlier statutes as dealing with removal. So treating the enactments the contention of the appellants is right.

Judgment for the appellants.

Solicitors for appellants: *Harrison & Powell.*
Solicitors for respondents: *White & Co.*

J. R.

1889
Nov. 5.

PATRICK *v.* SIMPSON AND OTHERS.

Limitations, Statute of (3 & 4 *Wm.* 4, *c.* 27), *s.* 25—*Devise on Trust—Possession by Trustees for twelve years—Claim by Heir-at-law—"Express Trust."*

The testator devised a house and all other his real estate to his executors upon trusts, the declaration of trust being as to the house only. He died seised of two other houses, and his executors took possession of them, and received the rents for more than twelve years from the death of the testator. His heir-at-law afterwards brought an action against the executors, alleging that the two houses vested in them in trust for him, and claimed execution of the trust :—

Held, on the authority of *Salter* v. *Cavanagh* (1 Dru. & Wal. 668), that there was on the face of the will an express trust for the heir-at-law within s. 25 of the Statute of Limitations (3 & 4 Wm. 4, c. 27), and that his right was not barred.

APPEAL from Great Yarmouth County Court.

This was an action by the son and heir-at-law of a testator against the executors.

By will dated January 1, 1870, the testator appointed his wife and son-in-law executrix and executor, and devised and bequeathed to them, their heirs, executors, administrators and assigns, his freehold house, Row 59, Great Yarmouth, in which he then resided, and his furniture and all other his real and personal estate, upon trust to permit his wife to have the use of the said house and furniture during her life, but subject to the payment of his debts, and upon her decease then it was his will and desire that his said house, together with the furniture, should be sold and the proceeds divided between his three children, whom he named, equally.

The testator died in 1876, and at the time of his death was seised of two other freehold houses, Nos. 3 and 6 in Row 102, in addition to that specified in the will. His widow thereupon took possession of the two houses in Row 102, and had ever since let them and taken the rents and profits. The plaintiff maintained that the said two houses vested in the executors in trust for him as the testator's heir-at-law, and claimed that the trusts of the will so far as regarded the said two houses and rents and profits thereof should be executed. The widow set up as a defence the

Statutes of Limitation, and also her right to dower in house No. 6.

The plaintiff contended that it was the case of an "express trust," and was therefore excepted from the operation of the statute by s. 25. (1) The right to dower was admitted. The judge held that the two houses 3 and 6 vested in the defendants in trust for the plaintiff, subject to the widow's right to dower out of house No. 6, and ordered accounts to be taken.

W. Hatfield Green, for the defendant executrix. The two houses pass under the gift of the realty; and there is a resulting trust in favour of the heir-at-law, who, if he had sued within twelve years, would have been entitled to recover, but he is now barred by the Statute of Limitations. He claims as heir against the will, and cannot be heard to say there is an express trust in his favour. No case is exactly in point, but the meaning of the phrase "express trust" in s. 25 has been discussed in the courts. In *Dickenson* v. *Teasdale* (2) Lord Westbury, C., said (3): "The words 'express trust' in the statute are used by way of opposition to trusts arising by implication, trusts resulting, or trusts by operation of law." In *Cunningham* v. *Foot* (4) Lord Cairns, C., said (5): "There must be an 'express trust,' by which I understand the legislature to mean a trust which arises on the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience; a trust arising upon the words of the instrument itself." *Sands* v. *Thompson* (6) is to the same effect.

The only case which seems adverse to the defendants is *Salter* v. *Cavanagh* (7), decided in Ireland, where lands were devised to

(1) 3 & 4 Wm. 4, c. 27, s. 25, provides "that when any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

(2) 1 D. J. & S. 52.

(3) At p. 59.

(4) 3 App. Cas. 974.

(5) Ibid, at p. 984.

(6) 22 Ch. D. 614, at p. 617.

(7) 1 D. & Wal. 668.

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a person on trust to receive the rents and pay certain annuities out of them. The annuities did not quite exhaust the rents, and it was held that the heir-at-law was entitled to the surplus rents, and his right was not barred by the statute. But that case is distinguishable on the ground pointed out by Kekewich, J., in *Churcher* v. *Martin* (1), that the trust there spoken of as express was one inferred from the deed and discoverable on the face of it, and not, as in *Churcher* v. *Martin* (1), "a trust against the deed and due only to the fact that the deed is void."

Haldane, for the plaintiff. There is no case in the books on the point, except *Salter* v. *Cavanagh* (2), which, however, is precisely applicable. The property is devised to the executors, on trust, and a Court of Equity will supply the beneficiary—in this case the heir at law. The Act 3 & 4 Wm. 4, c. 27, s. 25, does not render it essential that the cestui que trust should be named in the instrument creating the trust. "It is not necessary to use the word *trust* in order to create an express trust within the meaning of the statute, but any language that would in equity raise or imply a trust will be deemed an express trust. If, therefore, land be devised to a person upon trust to receive the rents and thereout to pay certain annuities, the surplus rents result to the heir-at-law upon the face of the instrument, and this being an express trust, the heir-at-law is not barred by any length of possession by the trustee": Lewin on Trusts, 8th ed., p. 877, citing *Salter* v. *Cavanagh*. (2) The Statute of Limitations, said Lord Plunket, C., in that case, has no application to express trusts, "and though a constructive trust would be barred previously to it by length of time, yet that doctrine applies to cases where the trust does not arise on the face of the instrument itself, but is to be made out by evidence," and this passage is cited in Shelford's Real Property Statutes, 8th ed., at p. 202. The view of Lord Plunket, C., is adopted by Lord St. Leonards in his treatise on the Real Property Statutes (2nd ed.), p. 99.

Lord Westbury did not even suggest in *Dickenson* v. *Teasdale* (3) that a cestui que trust must be named in the instrument creating the express trust, and the observations of Lord Cairns, C., in

(1) 42 Ch. D. 312, at p. 319. (2) 1 D. & Wal. 668.
(3) 1 D. J. & S. 52.

Cunningham v. *Foot* (1) were not directed to the present point. In *Churcher* v. *Martin* (2) the deed creating the trust was absolutely void.

W. Hatfield Green, replied

HUDDLESTON, B. The question is whether in this will there is an express trust as to the two houses subsequently acquired by the testator. Several authorities have been cited, but the learned counsel admit that diligent search has not enabled them to find a case in point amongst the decisions of the English Courts. The testator transferring all his property to the trustees merely specifies one house and not the other two of which he died seised, and therefore, it is said there is no express trust with respect to those two houses, and that no cestui que trust is mentioned. The case of *Salter* v. *Cavanagh* (3) is relied on for the plaintiff, and the learned counsel for the defendant, admitting that he felt pressed by it, endeavoured to distinguish it, and seemed to suggest that it had not the same authority as a decision in our own courts; but it is exactly this case, and I do not see any distinction. The case of *Churcher* v. *Martin* (2) is, on the other hand, distinguishable on the ground that there the deed conveying the land to trustees, who had been in possession of it for more than twelve years, was absolutely void under the Mortmain Act. I find that Lord St. Leonards in his treatise on the Real Property Statutes has, at p. 99, a passage written on the authority of *Salter* v. *Cavanagh* (3), and, consequently, supporting Lord Plunket's view in that case; Mr. Lewin also has adopted it. I am, therefore, of opinion that the judgment of the county court judge was right.

STEPHEN, J. I am of the same opinion. It seems to me that *Salter* v. *Cavanagh*, (3) strongly corroborated as it is by Lord St. Leonards and the other authorities, must decide the question before us. Of course there is the distinction between English and Irish cases that the laws of the two countries in many respects do not agree, but no difference between them enters into the present

(1) 3 App. Cas. 974, at p. 984. (2) 42 Ch. D. 312.
(3) 1 D. & Wal. 668.

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question. It is superfluous to say anything as to the authority of Lord Plunket. He had to decide a case almost untouched by the English decisions, and he decided it with the general concurrence of the authorities with respect to interpretation of wills.

Appeal dismissed.

Solicitors for plaintiff: *Coote & Ball.*

Solicitors for defendants: *Cattarns, Jehu, & Hughes.*

J. R.

Oct. 28.

THORNTON *v.* CLEGG AND OTHERS, JUSTICES OF SHEFFIELD.

Inn—Licensing Acts—Neglect of outgoing Tenant to apply for Renewal—Refusal to grant Licence to incoming Tenant—Right of Appeal to Quarter Sessions—Intoxicating Liquors Licensing Act, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 4, 14, 27—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 74, 75, *Sched.* 2.

By s. 75 and sched. 2 of the Licensing Act, 1872, ss. 27, 28, and 29 of the Licensing Act, 1828, which gave a right of appeal to quarter sessions to any person aggrieved by any act of justices done in the execution of that Act, are repealed, except so far as they relate to "the renewal of licences or to the transfer of licences under ss. 4 and 14 of the same Act."

The outgoing tenant of a licensed house wilfully refused or neglected to apply for a renewal of the licence, and left the house on the day of the last adjournment of the general annual licensing meeting. The new tenant applied at a special sessions for the grant to himself of a licence under s. 14 of the Licensing Act, 1828; but his application was refused. An appeal to quarter sessions was dismissed upon the ground that the application to justices was not an application for the renewal or transfer of a licence under ss. 4 and 14 of the Licensing Act, 1828, and that the right of appeal had, therefore, been taken away by s. 75 and sched. 2 of the Licensing Act, 1872:—

Held, that the quarter sessions were wrong; that the application was one for a renewal or transfer of a licence under ss. 4 and 14 of the Licensing Act, 1828, and that the right of appeal was, therefore, preserved by the exception contained in sched. 2 of the Licensing Act, 1872.

CASE stated by the quarter sessions for the West Riding of Yorkshire.

It appeared that the general annual licensing meeting for the borough of Sheffield was held on August 22, 1888, and the last adjournment thereof on September 26, and that notice had been given to one Shuttleworth, the tenant of a beerhouse, of opposition to the renewal of his licence. Shuttleworth, who had been convicted of an offence against the Licensing Acts, wilfully

neglected to apply for a renewal of his licence at the general annual licensing meeting, or at any adjournment thereof, and the licence was not renewed. Shuttleworth quitted the premises on September 26, the day of the last adjournment of the annual licensing meeting. On the following day Thornton, the appellant, who was the new tenant of the house, applied to two justices in petty sessions under 5 & 6 Vict. c. 44, s. 1, and obtained an indorsement on the current licence authorizing him to carry on the business under that licence which expired on October 10, 1888. On October 10 the appellant applied at a special sessions for the grant of a licence under 9 Geo. 4, c. 61, s. 14, but the application was refused by the justices. Upon appeal to quarter sessions, it was objected that the application of the appellant on October 10 was not an application for the renewal or transfer of a licence under ss. 4 and 14 of 9 Geo. 4, c. 61, and that there was therefore no right of appeal to quarter sessions. The court of quarter sessions held that the objection was good, and dismissed the appeal subject to a case.

The appeal to quarter sessions was taken under the provisions of ss. 27, 28, 29 of the Licensing Act, 1828 (9 Geo. 4, c. 61), which gave a power of appeal to any person who should think himself aggrieved by any act of any justice done in or concerning the execution of that Act.

By s. 75 and sched. 2 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), ss. 27, 28, and 29 of the Licensing Act, 1828, are repealed, except in so far as they relate to "the renewal of licences or to the transfer of licences under ss. 4 and 14 of the same Act."

The question for the opinion of the Court was whether the appellant's application to the respondent justices on October 10 came within the terms of the exception contained in sched. 2 of the Licensing Act, 1872.

R. S. Wright, and *Asquith*, (*Poland, Q.C.*, with them), for the appellant. The application of the appellant was in terms an application under s. 14 of 9 Geo. 4, c. 61, and it was in substance an application for a renewal or transfer of a licence under ss. 4 and 14 of the Act; the right of appeal has, therefore, been pre-

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served by the exception in sched. 2 to the Licensing Act, 1872. The words "transfer" and "renewal" in sched. 2 of the Licensing Act, 1872, must be understood in the sense in which they are used in 9 Geo. 4, c. 61, and not merely in the sense which is given to them by the definition clause (s. 74) of the Licensing Act, 1872. It is immaterial that the appellant's application was not made until October 10; it may be made even after the expiration of the original licence: *Reg.* v. *Justices of Liverpool.* (1)

J. Paterson (*C. S. Hunter*, with him), for the respondents. This is not an application for a renewal or transfer of a licence, for by s. 74 of the Licensing Act, 1872, "renewal" is defined as a licence granted at a general annual licensing meeting by way of renewal, and "transfer" as a transfer made in special sessions in exercise of the power granted to justices by s. 4 of 9 Geo. 4, c. 61. The licence applied for by the appellant was not a transfer of a licence under s. 4 of the Act of Geo. 4, for there was no existing transferable licence; but the application was for the "grant" of a licence under s. 14 of that Act, that is to say, for the re-grant of a licence which had lapsed. Moreover, by the proviso at the end of s. 14 six weeks' notice must, under circumstances like those existing in this case, be given of an application to a special sessions under that section, whereas the appellant only gave the ordinary fourteen days' notice required in the case of an application for a transfer; he is, therefore, not within s. 14 at all.

HUDDLESTON, B. I am of opinion that the justices in quarter sessions were wrong in thinking that there was no right of appeal. The case really turns on four words in sched. 2 to the Act of 1872. The power of appeal was given by ss. 27, 28, 29 of the Act of Geo. 4, but by the Act of 1872 these sections were repealed except so far as affected transfers and renewals under ss. 4 and 14 of the same Act, and the only question is whether this was an application for a transfer or renewal under those sections. The facts are very simple; Shuttleworth misconducted himself and was convicted, and appears to have refused in any way to assist his landlord to obtain a transfer or renewal to another tenant. This seems to me to be the very case contemplated by

(1) 11 Q. B. D. 638.

s. 14 of the Act of Geo. IV., and I am clearly of opinion that there was a right of appeal to quarter sessions.

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MATHEW, J. I am of the same opinion for the same reasons.

Appeal allowed.

Solicitors for appellant: *Pitman & Sons, for Chambers & Son, Sheffield.*

Solicitors for respondents: *Peacock & Goddard, for Vickers, Son, & Brown, Sheffield.*

W. J. B.

[IN THE COURT OF APPEAL.]

Nov. 20.

TOMLINSON *v.* THE CONSOLIDATED CREDIT AND MORTGAGE CORPORATION.

*Landlord and Tenant — Removal of Goods to prevent Distress — Action for Double Value—*11 *Geo.* 2, *c.* 19, *ss.* 1, 3*—Bill of Sale—Seizure by Grantee —Removal of Goods before expiration of five clear days—Consent of Grantor —Rights of Landlord — Bills of Sale Act,* 1882 (45 *&* 46 *Vict. c.* 43), *ss.* 7, 13.

The statute 11 Geo. 2, c. 19, s. 3, which gives to landlords a right of action to recover double the value of goods fraudulently carried off the premises to avoid a distress, applies to the goods of the tenant only, and not to those of a stranger.

The provision in s. 13 of the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), that all chattels seized under a bill of sale shall remain on the premises where they were so seized for five clear days after seizure is for the benefit of grantors only.

Where, therefore, a tenant of the plaintiff had given the defendants a bill of sale over his furniture, and the defendants seized the furniture under their bill of sale, and within five days removed it by the authority of the tenant, with the intention of preventing the plaintiff from distraining for rent then due:—

Held, that, the furniture being the property of the defendants as grantees of the bill of sale, an action for double value under 11 Geo. 2, c. 19, s. 3, would not lie against them:—

Held, also, that the plaintiff had no cause of action in respect of the removal of the goods by the defendants within five days after the seizure under the bill of sale.

Lane v. *Tyler* (56 L. J. (Q. B. D.) 461) approved.

APPEAL from the judgment of a Divisional Court (Field and Manisty, JJ.) setting aside a verdict and judgment for the plaintiff and entering judgment for the defendants.

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TOMLINSON v. CONSOLIDATED CREDIT AND MORTGAGE CORPORATION.

The action was brought to recover damages for the removal of goods seized under a bill of sale before the expiration of five clear days after their seizure, contrary to the provisions of s. 13 of the Bills of Sale Act, 1882. An alternative claim was subsequently added under 11 Geo. 2, c. 19, s. 3, to recover double value of goods alleged to have been fraudulently removed from a house of which the plaintiff was the landlord, with the intention of preventing the plaintiff from distraining for arrears of rent due from one Flicker, his tenant. It appeared that on September 29, 1888, the day of the removal of the goods, there was due from Flicker to the plaintiff about 30*l.* in respect of rent falling due at Lady Day, Midsummer, and Michaelmas, 1888; that Flicker had given the defendants a bill of sale over his furniture and goods in the house, and had made default in his payments under the bill of sale; that the defendants on September 28 seized the furniture and goods under their bill of sale, and that at 10 P.M. on September 29 they removed the goods by Flicker's authority to a house indicated by him. It was admitted that at the time of the removal the defendants knew that rent was owing by Flicker to the plaintiff, in respect of which the latter was entitled to distrain. A verdict and judgment for the plaintiff were set aside by the Divisional Court upon the ground that the goods were not the tenant's goods within the meaning of 11 Geo. 2, c. 19, ss. 1, 3 (1), and judgment was entered for the defendants. The plaintiff appealed.

Waddy, Q.C. (*Hammond-Chambers* and *John Ogle*, with him) for the plaintiff. The action is maintainable. It is true that the

(1) By s. 1 of 11 Geo. 2, c. 19, power is given to landlords within thirty days to distrain and sell goods fraudulently carried off the premises with intent to prevent a distress for rent.

By s. 3: "If any such tenant or lessee shall fraudulently remove and convey away his or her goods or chattels as aforesaid, or if any person or persons shall wilfully and knowingly aid or assist any such tenant or lessee in such fraudulent conveying away or carrying off of any part of his or her goods or chattels, or in concealing the same, all and every person and persons so offending shall forfeit and pay to the landlord or landlords, lessor or lessors, from whose estate such goods and chattels were fraudulently carried off as aforesaid double the value of the goods by him, her, or them respectively carried off or concealed as aforesaid."

statute of Geo. 2 is aimed at the fraudulent removal of the tenant's goods, but these goods were the tenant's, notwithstanding the bill of sale. Whatever interest in the goods may at law have passed to the defendants as the grantees under the bill of sale, the tenant still remained the owner of the goods in equity, and his equitable ownership is sufficient to satisfy the language of the statute. The mere fact that the goods were in the tenant's house is primâ facie evidence that they were the tenant's goods, and the contrary must be conclusively shewn by the defendants.

Even if that be not so, the defendants have not complied with the express provision of s. 13 of the Bills of Sale Act, 1882 (1), that goods seized under a bill of sale shall not be removed from the premises where they were seized until the expiration of five clear days from the seizure. This provision is not intended merely for the regulation of the rights of the grantor and grantee: it is for the protection also of creditors and third parties generally, who have an absolute right to have the goods left on the premises for five clear days before removal. It is true that in *Lane* v. *Tyler* (2) a Divisional Court held that the section was for the benefit of grantors only; but that case was wrongly decided, and ought to be overruled.

Cock, Q.C. (*W. H. Clay*, with him), for the defendants. The decision in *Lane* v. *Tyler* (2) is good law, and is in accordance with previous decisions.

The provisions of 11 Geo. 2, c. 19, ss. 1, 3, are only applicable to the goods of the tenant, and not to those of a stranger: *Thornton* v. *Adams* (3); and it is idle to contend that these were the tenant's goods; the property in them had passed to the defendants under the bill of sale. The case of *Foulger* v. *Taylor* (4),

(1) By the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 7, a grantor of a bill of sale may within five days from the seizure or taking possession of any chattels for the causes therein mentioned apply to the Court or a judge in certain cases to restrain the grantee from removing or selling the chattels.

By s. 13: "All personal chattels seized or of which possession is taken . . . . under or by virtue of any bill of sale . . . . shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of."

(2) 56 L. J. (Q. B. D.) 461.

(3) 5 M. & S. 38.

(4) 5 H. & N. 202.

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though upon another statute, is precisely in point as to the proper construction of 11 Geo. 2, c. 19.

LORD ESHER, M.R. In my opinion this appeal must fail. The action is brought upon the statute of 11 Geo. 2, c. 19, by which it is provided that if a tenant fraudulently or clandestinely removes his goods with the view of preventing a distress, his landlord may within thirty days follow and distrain the goods for rent due, and may recover against all persons offending double the value of the goods so removed; and the first question we have to determine is, whether the plaintiff can successfully maintain an action against the defendants under that statute. Now the 1st section of the statute says that the consequence enacted may take effect if the goods are fraudulently removed for the purpose and with the intent of preventing the landlord from distraining for rent due. Here there was rent due, and there were goods on the premises, and those goods were removed in order to prevent the landlord exercising his right of distress. But the answer is, that the goods were not the goods of the tenant; the property in them had been transferred to the defendants under their bill of sale. It was apparently assumed at the trial that the goods removed were those mentioned in the bill of sale. If that be so, the legal property in those goods passed to the defendants the moment the bill of sale was executed, and from that moment the goods were in point of law the property of the grantees of the bill of sale. The statute of Geo. 2 was passed to deal with the legal property in goods, and not with the view of enforcing any equitable rights amongst the parties; and it is therefore plain that this case cannot be brought within the statute.

It was said, however, in argument that the landlord has another right; that he has been injured because by s. 13 of the Bills of Sale Act, 1882, it is provided that where goods are seized or taken possession of under a bill of sale they shall remain on the premises, and shall not be removed or sold for five clear days after seizure; that in the present case the goods had been removed before the expiration of the five days, and that this fact prevented the landlord from distraining upon the goods, as

he could have done, although they were not the goods of the tenant. It is true that if they had been removed within the statutory period without the authority of the grantor of the bill of sale, the bill of sale holder would have committed a breach of the statute, though he could only have been sued in respect of such a breach by the grantor of the bill of sale. The Bills of Sale Act was not passed for the benefit of landlords or of third parties, but for the regulation of the rights of the giver and the holder of the bill of sale, and the decision in *Lane* v. *Tyler* (1) is, in my opinion, perfectly right. Neither cause of action can, therefore, be maintained; and as there was no evidence for the jury on which they could properly return a verdict for the plaintiff, the judges in the Divisional Court were right in ordering judgment to be entered for the defendants, and this appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. The statute of Geo. 2 expressly gives the right of action for double value in cases where the tenant's goods are removed; so that there is nothing wrong if somebody other than the tenant removes his own goods in order to prevent their being distrained. The question therefore is, whose were the goods which were removed? From the point of view of an equity lawyer, I thought at first that they might possibly be said to be the mortgagor's, but upon reflection it is abundantly clear that this cannot be so. The legal ownership is in the mortgagees, and the goods are theirs, not only in the sense in which they would be so called for the purposes of an interpleader issue, but also for the purpose of the reputed ownership clauses in the Bankruptcy Act, and for other purposes. It is far too late to suggest seriously that they are the mortgagor's, and not the mortgagees' goods.

A second point arose upon the decision in *Lane* v. *Tyler*. (1) Looking at the provisions of the Bills of Sale Act, 1882, not merely at s. 13, but also at s. 7, by which the grantor has five days within which to redeem goods seized under a bill of sale, one sees what the legislature meant, and it is clear that the construction put upon those sections in *Lane* v. *Tyler* (1) is absolutely correct.

(1) 56 L. J. (Q. B.) D.) 461.

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LOPES, L.J. This action is brought upon the statute, and unless the plaintiff can shew that the goods removed were the property of the tenant he cannot succeed. It is abundantly clear, however, that these were not the tenant's goods, for he had parted with the property in them, which had passed to the grantees under the bill of sale.

As to the point taken upon s. 13 of the Bills of Sale Act, 1882, we have been asked to reverse the decision in *Lane* v. *Tyler* (1), by which it was held that the provisions of that section are for the benefit of grantors only. I agree, however, with the rest of the Court that the decision in that case is perfectly good law, and am quite unable to overrule it.

Appeal dismissed.

Solicitor for plaintiff: *J. B. Churchill.*

Solicitors for defendants: *Paul E. Vanderpump & Eve.*

W. J. B.

(1) 56 L. J. (Q. B. D.) 461.

GIFFORD *v.* OVERSEERS OF ST. LUKE'S, CHELSEA.

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Nov. 11.

Parliament—Registration—Borough Vote—Service of Notice of Objection— 6 & 7 *Vict. c.* 18, *s.* 17.

By 6 & 7 Vict. c. 18, s. 17, the person objecting to a borough voter "shall give or cause to be left at the place of abode of the person objected to, as stated in the list, a notice numbered," &c. (according to the form prescribed).

An objector caused a notice to be placed in the letter-box at the house stated in the list to be the place of abode of the voter objected to. It appeared that the voter had not resided in the house for the last two years, that the objector did not know his true address, and that there was no reason to suppose that the notice reached or was likely to have reached the voter :—

Held, that there had not been sufficient service of the notice within the meaning of the section.

Allen v. *Greensill* (4 C. B. 100) followed.

CASE stated by the revising barrister for the borough of Chelsea.

The appellant objected to the names of John Horner and twenty others being inserted on division one of the occupiers' list as parliamentary voters and county electors on the ground that they had respectively not occupied the premises mentioned in the overseers' list during the qualifying period.

The notices of objection were addressed to the places of abode mentioned in this list, and were served by being dropped into the letter-boxes of the houses. It appeared that John Horner had not resided at the address for the last two years, that the appellant did not know his correct address, and that there was no reason to suppose that the notice reached him or was likely to have done so. The evidence in the other cases was similar.

The revising barrister held that the notices had not been sufficiently served within the meaning of 6 & 7 Vict. c. 18, s. 17, and retained the names on the list. If he was wrong, the names were to be erased.

Costelloe, for the appellant. "Causing" a notice "to be left at the place of abode of the person objected to as stated in the list" is statutory service as regards borough lists under s. 17 of 6 & 7

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Vict. c. 18. (1) The omission from the section of the words "shall give or cause to be given to the person objected to," which are used in s. 7 as regards county lists, shews that it is immaterial whether the notice does or does not reach the borough voter, provided it is served in the statutory manner.

[LORD COLERIDGE, C.J., referred to *Allen* v. *Greensill* (2) and *Watson* v. *Pitt.* (3)]

In *Noseworthy* v. *Overseers of Buckland-in-the-Moor* (4) the Court held that where the address in the list was wrong, service at the right address was bad.

C. M. Chapman, for the respondents, was not heard.

LORD COLERIDGE, C.J. I am of opinion that the decision of the revising barrister was correct. The case is governed by *Allen* v. *Greensill* (2), which was decided as long ago as 1847 by a very powerful Court. It is there pointed out that the object of the provisions of the Act with respect to notices of objection is to insure that the objection shall be brought to the knowledge of the voter, and that the objector has a choice of three modes of service. The first is personal service. This is not always easy, and the statute does not render it obligatory. The second is service by post. This throws the responsibility for the delivery of the notice on the post-office, and, if it is returned to him, the objector knows that he has not succeeded in serving it. The third is service by leaving the notice at the place of abode of the voter as described in the list. The object of this mode of service,

(1) By 6 & 7 Vict. c. 18, s. 7: "In every year every person who shall be upon the register for the time being for any county may object to any other person upon any list of voters for such county . . . and every person so objecting shall . . . give or cause to be given to the person so objected to, or have or cause to be left at his place of abode, as described in such list, a notice according to the form numbered," &c.

By s. 17: "Every person whose name shall have been inserted in any list of voters for any city or borough may object to any other person . . . and every person so objecting shall . . . give or cause to be left at the place of abode of the person objected to as stated in the said list, a notice according to the form numbered," &c.

By s. 100: "It shall be sufficient . . . . if the notice so required to be given as aforesaid shall be sent by the post, free of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters."

(2) 4 C. B. 100.

(3) 5 C. B. 77.

(4) Law Rep. 9 C. P. 233.

that adopted by the objector in *Allen* v. *Greensill* (1), as by the appellant here, is, equally with that of the other modes, to bring the objection to the knowledge of the voter. The Court said: "If" the objector "chooses to select service at the place of abode as described in the list, he must take the risk of its turning out not to be the true place of abode." There, as here, this proved to be the case, and the Court held that the notice had not been served within the meaning of s. 17 of the Act. And in *Watson* v. *Pitt* (2), decided in the following year, Wilde, C.J., said: "The time and mode of service must be such as to afford reasonable ground for presuming that the notice will reach the hands of the person for whom it is intended." Any other construction of the section would leave it open to a dishonest objector to disfranchise a voter by leaving an illusory notice of objection at an address at which he knew that the voter did not reside.

In *Watson* v. *Pitt* (3) Maule, J., appears to have expressed the opinion that the question whether or not a notice had been sufficiently served was one of fact for the revising barrister. If so, the revising barrister has decided the question against the appellant. But it is not necessary that I should criticise this opinion, that of a judge from whom I should hesitate to dissent. *Allen* v. *Greensill* (1) is a direct authority, and the construction there put upon the section is in my opinion its true and reasonable construction.

The case of *Noseworthy* v. *Overseers of Buckland-in-the-Moor* (4) involved a different question, arising under another section of the statute, and cannot be supposed to affect the authority of the decisions to which I have referred. They are not mentioned in the judgments, and it is manifest that the Court did not intend to overrule them.

The appeal will therefore be dismissed.

MATHEW and WILLS, JJ., concurred.

Appeal dismissed.

Solicitors for appellant: *Tathams & Procter.*

Solicitor for respondent: *T. J. Robinson.*

(1) 4 C. B. 100.
(2) 5 C. B. 77.
(3) 5 C. B. 77, at p. 86.
(4) Law Rep. 9 C. P. 233.

H. D. W.

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Nov. 11.

AINSLEY *v.* NICHOLSON.

Parliament — Registration — Lodger Claim — Declaration — Power to amend Declaration—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 30, *sub-s.* 2—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s* 2 — *Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 2, *Form H. No.* 2.

A lodger claiming as sole tenant omitted to erase in his declaration, which was in the form prescribed in Form H., No. 2, Sched. 2 to s. 18 of the Registration Act, 1885, the words "(or as joint tenant with ——)":—

Held, that the declaration being part of the statutory claim of a lodger, the revising barrister had power to correct the omission as a "mistake in a claim" under s. 28, sub-s. 2, of the Parliamentary and Municipal Registration Act, 1878.

CASE stated by the revising barrister for the Hornsey division of the county of Middlesex.

The appellant Ainsley claimed to be placed on the lodgers' list of parliamentary voters for the division in respect of the occupation of certain lodgings, as it appeared, as sole tenant. The declaration annexed to his claim was as follows: "I hereby declare that I have during the twelve calendar months immediately preceding the fifteenth day of July in this year occupied as sole tenant (or as joint tenant with ——), and resided in the above-mentioned lodgings, and that those lodgings are of a clear yearly value, if let unfurnished, of ten pounds or upwards." (1) The words in brackets were not erased.

The revising barrister disallowed the claim on the ground that the declaration did not shew whether the claimant was sole

(1) See Form H. No. 2, in Sched. 2 to s. 18 of the Registration Act, 1885 (48 Vict. c. 15), substituted by Order in Council under s. 13 of the County Electors Act, 1888 (51 Vict. c. 10).

By the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 30, sub-s. 2: "The claim of every person desirous of being registered as a voter in respect of the occupation of lodgings shall be in the form . . . . or to the like effect, and shall have annexed thereto a declaration, ... and every such claim shall . . . . be delivered to the overseers of the parish in which such lodgings shall be situate."

By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28: "A revising barrister shall . . . . perform the duties and have the powers following:" Sub-s. 2 "He may correct any mistake which is proved to him to have been made in any claim or notice of objection."

or joint tenant, and declined to amend, as he held that sub-s. 2, s. 28, of the Parliamentary and Municipal Registration Act, 1878, did not apply to the case.

If the Court held that he had power to amend the declaration, the name of the appellant, and those of 125 other persons, whose claims were disallowed for similar reasons, were to be placed upon the lodgers' list.

Macmorran, for the appellant, was stopped by the Court.

No counsel appeared for the respondent.

LORD COLERIDGE, C.J. The revising barrister was wrong. The declaration is a part of the statutory claim to the lodger franchise, the revising barrister had therefore power to correct the mistakes in these declarations as mistakes in claims. The appeal must be allowed.

MATHEW and WILLS, JJ., concurred.

Appeal allowed.

Solicitors for appellants: *Jennings & Forbes.*

H. D. W.

NICHOLSON *v.* YEOMAN.

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Nov. 11.

Parliament—Registration—Successive Occupation of Houses as Servant and Householder—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 26—*Representation of the People Act*, 1884 (48 *Vict. c.* 3), *ss.* 2, 3.

Occupation during the qualifying period of two dwelling-houses in immediate succession, the first by virtue of service, the second as a householder, is a qualification for the parliamentary occupation franchise.

Torish v. *Clarke* (18 Ir. R. 285) approved.

CASE stated by the revising barrister for the Whitby Division of the North Riding of Yorkshire.

One Estill and another claimed to be placed on division two of the occupiers' list as persons qualified as parliamentary voters only in respect of the successive occupation of two dwelling-houses, the first by virtue of service under s. 3, the second as

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householders under s. 2 of the Representation of the People Act, 1884. (1)

The revising barrister disallowed the claims. If he was wrong, the names were to be placed upon the list.

P. A. Germaine, for the appellant. The case was one of successive occupation within the meaning of s. 26 of the Representation of the People Act, 1867.

W. A. Meek, for the respondent. The present question has been decided in favour of the appellant in the Irish Court of Appeal in *Torish* v. *Clarke*. (2)

LORD COLERIDGE, C.J. The revising barrister was wrong. There was clearly successive occupation within the meaning of the section. The character of the occupation is immaterial. It is satisfactory to find that in *Torish* v. *Clarke* (2) the Irish Court of Appeal came to the same conclusion. The appeal will be allowed.

MATHEW and WILLS, JJ., concurred.

Appeal allowed.

Solicitor for appellant: *H. W. Chatterton.*

Solicitors for respondent: *Lowe & Sons, for Trevor, Gainsborough.*

(1) By the Representation of the People Act, 1884 (48 Vict. c. 3), s. 2: "A uniform household franchise . . . shall be established in all counties and boroughs, ... and every man possessed of a household qualification . . . . shall, if the qualifying premises be situated in a county in England, be entitled to be registered as a voter."

By s. 3: "Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant."

By the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 26: "Different premises occupied in immediate succession by any person as owner or tenant during the twelve calendar months next previous to the last (now the 15th) day of July in any year shall . . . . have the same effect in qualifying such person to vote for a county or borough as a continued occupation of the same premises in the manner herein provided."

(2) 18 Ir. L. R. 285.

H. D. W.

MARSH *v.* ESTCOURT.

1889
Nov. 11, 12.

Parliament—County Elector—Registration—Nature of Occupation, whether as Householder, or by virtue of Service—Payment of Rates—Poor-rate Assessment and Collection Act, 1869 (32 & 33 *Vict. c.* 41), *ss.* 7, 19—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 14—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 9, 32, 44 (1), 45 (7), 47 (1), 147—*Representation of People Act*, 1884 (48 *Vict. c.* 3), *ss.* 2, 3—*County Electors Act*, 1888 (51 *Vict. c.* 10), *s.* 2, *sub-s.* 1.

By the County Electors Act, 1888, any person possessing outside the limits of a borough the burgess qualification under the Municipal Corporations Act, 1882, is entitled to be registered under the Act as a county elector in the parish in which the qualifying property is situate.

By s. 32 of the Municipal Corporations Act, 1882: "(1) If an occupier of any qualifying property, whether the landlord is or is not liable to be rated to the parish in respect thereof, claims to be rated to the poor-rate in respect thereof, and pays or tenders to the overseers of the parish where the property is situate the full amount of the poor-rate last made in respect of such property, the overseers shall put the occupier's name on the rate-book in respect of that rate."

"(2) If they fail to do so, he shall nevertheless for the purposes of this Act be deemed rated to that rate."

The claimants were labourers residing in cottages on the farms of their employers. They were permitted but not required to live in the cottages on the terms that they were to give up possession when their employment ceased, and were either charged a reduced rent or had the rent deducted from their wages. The rates were paid by the employers, and the names of the claimants appeared in the rate-book as occupiers:—

Held, that the facts shewed an occupation by the claimants not by virtue of service but as householders, that the above section did not apply, and the claimants possessed a burgess qualification, and that they were therefore entitled to be placed on division one of the occupiers' list as both parliamentary voters and county electors.

CASE by the revising barrister for the Isle of Wight.

Charles Chiverton and fifty-seven other agricultural labourers claimed to be placed on division one of the occupiers' list as parliamentary voters and county electors. It appeared that they each occupied a cottage on a farm, but were not required to do so by the farmers, their masters, who allowed them to reside under verbal agreements by which they were to pay a reduced rent, or were to have the rent deducted from their wages, and were to give up possession as soon as their employment ceased.

The case also stated as follows: "All the claimants had occu-

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pied during the full qualifying period, but none of them paid any rates. The cottages occupied by the claimants were in each case rated with the farm, and the rates were paid as a whole by the farmer; but the names of the claimants respectively were stated in the rate-book as occupiers of the cottages on the farms, in some cases from a return in writing furnished to the overseer by the farmer himself, in other cases from information obtained otherwise by the overseer."

The revising barrister placed the claimants in division two of the occupiers' list as parliamentary voters only qualified in respect of occupation "by virtue of office, service or employment," under s. 3 of the Representation of the People Act, 1884. If he was wrong the names were to be transferred to division one.

R. S. Wright, for the appellant. The revising barrister was wrong. The claimants occupied the cottages not as servants but as tenants: *Smith* v. *Overseers of Seghill.* (1) They were also clearly burgesses under s. 2, sub-s. 1, of the County Electors Act, 1888.

W. Graham, for the respondent. The revising barrister was right. It is contended that the claimants did not possess a burgess qualification. Sect. 2, sub-s. 1, of the County Electors Act, 1888, refers to s. 9 of the Municipal Corporations Act, 1882 (2),

(1) Law Rep. 10 Q. B. 422.

(2) By sub-s. 2 of s. 9 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50): "A person shall not be entitled to be enrolled as a burgess unless he is qualified as follows:—

(*d.*) "Has been rated in respect of the qualifying property to all poor-rates made during those twelve months (*i.e.*, twelve months preceding July 15) for the parish wherein the property is situate; and

(*e.*) "Has on or before the 20th of the same July paid all such rates, including borough rates (if any) as have become payable by him in respect of the qualifying property up to the then last preceding 5th of January."

By s. 32: "(1.) If an occupier of any qualifying property, whether the landlord is or is not liable to be rated to the poor-rate in respect thereof, claims to be rated to the poor-rate in respect thereof, and pays or tenders to the overseers of the parish where the property is situate the full amount of the poor-rate last made in respect of the property, the overseers shall put the occupier's name on the rate-book in respect of that rate."

"(2.) If they fail to do so, he shall nevertheless for the purposes of this Act be deemed rated to that rate."

which must be read along with s. 32. The effect of s. 32 is, it is submitted, to repeal former provisions such as s. 19 of the Poor-rate Assessment and Collection Act, 1869, which makes it immaterial as regards the occupier's qualification for the borough municipal franchise whether he or the owner pays the rates, and to render it essential that the occupier shall pay or tender them to the overseers. This the present claimants did not do.

[LORD COLERIDGE, C.J. If s. 32 of the latter Act is construed as referring only to cases in which the landlord is not rated, the two Acts are perfectly consistent.]

[WILLS, J., referred to s. 30 of the Reform Act, 1832.]

The facts also shew that the cottagers occupied "by virtue" of "their employment."

[LORD COLERIDGE, C.J. The contrary was held in *Hughes* v. *Overseers of Chatham* (1), in which the facts were very similar.]

In *M'Clean* v. *Prichard* (2) it was held that occupation by service is not a qualification for the municipal franchise.

R. S. Wright, in reply. There is no pretence for the suggestion that payment of rates by the occupier is necessary. Since the revival of compounding, it has been immaterial for voting purposes who pays the rates, provided they are paid. At present s. 1 of the County Electors Act, 1888, incorporates s. 19 of the Registration Act, 1885, and therefore incorporates the prior enactments as to rating in reference to registration, among others, the rating sections of the Poor Law Assessment and Collection Act, 1869, and those of the Parliamentary and Municipal Registration Act, 1878. The first of these Acts revived compounding. Sect. 3 legalized agreements by the overseers with owners for that purpose, and s. 4 enabled vestries to order owners to be rated instead of occupiers. Sect. 7 made payment of rates by owners equivalent to payment by occupiers "for the purpose of any qualification or franchise." Sect. 19 directed the overseers "in every case" without reference to whether or not he had paid the rates, "to enter the name of the occupier in the occupiers' column of the rate-book," and enacted that "such occupier shall be deemed to be duly rated for any qualification and franchise as aforesaid." In *Smith* v. *Overseers of Seghill* (3) it was decided that s. 19 did not refer only to cases under ss. 3 and 4, but was of general applica-

(1) 5 M. & G. 54. (2) 20 Q. B. D. 285. (3) Law Rep. 10 Q. B. 422.

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tion. This was declared to be the law by s. 14 of the Parliamentary and Municipal Registration Act, 1878. The Municipal Corporations Act, 1882, is a mere consolidating Act, and itself expressly applies the Poor-rate Assessment and Collection Act, 1869, in s. 147, and the Parliamentary and Municipal Registration Act, 1878, in ss. 44 (1), 45 (7), and 47 (1). The rating sections of these Acts therefore still apply, and under them, the rates being paid by the landlord, the claimants had a right to have, as they had, their names on the rate-book as occupiers, and were therefore qualified as county electors.

As to s. 32 of the Municipal Corporation Act, 1882, it has obviously no bearing on the present case. Its operation is confined to cases in which the landlord is not rated or has not paid the rates, and in which therefore the tenant is properly allowed to pay or tender the rates himself, in order that his name may appear on the rate-book.

WILLS, J. I am of opinion that this appeal should be allowed. No doubt the Court ought to be slow to hold that any portion of a statute is superfluous or has been introduced per incuriam. But I think that, if it were necessary to come to this conclusion in this case, the Court would be well warranted in doing so. We cannot be blind to the fact that the uniform tendency of recent legislation has been to recognise the occupier of land as a person on whom the burden of taxation is sure to fall, in part at least, whether actually or in the shape of increased rent, and therefore to provide him with the means of having his name placed on the rate-book, in order that it may, in due course, appear in the list of occupiers published by the overseers. Now the Municipal Corporations Act, 1882, is a measure the main object of which is the consolidation of prior enactments relating to municipal corporations. It deals incidentally, but only incidentally, with the municipal franchise. It would be strange indeed, in my opinion, that a section of this measure, a section which repeats a provision contained in a previous Act, should have the effect of reviving personal payment of rates as a necessary qualification for the municipal franchise. Such personal payment is not necessary as regards the parliamentary franchise, and if this Act has the effect which has been contended for, then this Act must be supposed

to repeal enactments which it purports merely to consolidate, with amendments, and thus, under the guise of an amendment, not specified as such, to go back upon political history, and to deal with the franchise in a manner wholly contrary to the well ascertained spirit of recent legislation. As the Act was introduced in order to simplify the existing law, it would be more natural to regard the 32nd section as hastily adopted in forgetfulness of the exact state of the existing law, than to suppose that the legislature really intended to revert to a limitation which it had deliberately abolished.

But the learned counsel for the appellant has removed the difficulty by pointing out that the section has still a sphere of operation. If the name of the tenant does not appear in the rate-book as occupier, the result to the tenant may in some cases be disfranchisement. This section comes to his rescue, and enables him, if his landlord is not rated or has not paid the rates, himself to pay or tender the amount due to the overseers, and so to entitle himself to have his name entered on the rate-book as occupier. The section is not therefore superfluous. It has a specific effect. An identical provision is to be found in the 30th section of the Reform Act of 1832. It might, indeed, be necessary to construe the same words in the subsequent Act differently, if subsequent legislation had shewn an intention that they should be so construed; but here subsequent legislation has shewn no such intention.

The other point admits of no doubt. In the case referred to by the learned counsel for the respondent the occupation was admitted to be occupation by virtue of service. Here the labourers were not required to reside in the cottages, but were allowed to reside in them as a privilege. It would be an abuse of language to call residence under such conditions occupation by virtue of service.

LORD COLERIDGE, C.J., and MATHEW, J., concurred.

Appeal allowed.

Solicitor for appellant: *Frith Needham.*

Solicitor for respondent: *Woolridge, Sandown, Isle of Wight.*

H. D. W.

1889
Oct. 24, 25

PYMAN BROTHERS *v.* DREYFUS BROTHERS & CO.

Ship—Demurrage—Charterparty—Lay Days—Arrival at Place of Loading.

By charterparty it was agreed that the plaintiff's steamship should proceed to "Odessa or so near thereunto as she might safely get," and there load a cargo, "twelve running days" (Sundays excepted) "to be allowed for loading and discharging, and ten days on demurrage over and above the said lay-days."

The port of Odessa contained an outer and an inner harbour. The vessel arrived at a point in the outer harbour at which she was as near as she might safely get to a loading berth, and the master gave notice to the defendants' (the charterers) agents that she was ready to load. The cargo was stored at a quay in the inner harbour, and the agents were unwilling to load it elsewhere. The quays in the two harbours were the only places at which it was practicable to load, but there was no custom by which steamships under charterparty were not considered ready to receive cargo until after being moored alongside a quay. Owing to the crowded state of the port there was much delay before the vessel was able to take her place at the quay in the inner harbour where the cargo was stored, and she was not loaded till more than twelve days had elapsed from the time of her arrival in the outer harbour:—

Held, that the lay-days were to be computed from the time of the arrival of the vessel in the outer harbour, and that the defendants were liable for demurrage.

MOTION by the defendants, the charterers of the steamship *Lizzie English*, to set aside an award in favour of the plaintiffs, her owners, in respect of a claim for demurrage and detention at Odessa, the port of loading.

By the charterparty it was agreed that the vessel should proceed as ordered at Constantinople to (among other ports) Odessa, or so near thereunto as she might safely get, and there load "always afloat" a cargo which she was to take to a port within certain limits, and "twelve running days" (Sundays excepted) were "to be allowed for loading and unloading and ten days on demurrage over and above the said lay-days at 4*d.* per ton on the steamer's gross registered tonnage per running day."

The award stated that on December 22, 1888, the *Lizzie English* reached the outer harbour at Odessa, and "as near" to a loading berth "as she might safely get;" that on that day the captain gave the defendants' agents notice that she was ready to load; that there were then no practicable means of loading her at Odessa except at or alongside a quay berth in the outer or in the

inner harbour; that a cargo was then ready for loading, and that the defendants were then ready and willing to load it if and so soon as the steamer got a loading berth alongside a quay in the inner harbour where the cargo was stored, but not before; that the harbour master refused to allow the steamer to go to a loading quay berth in the outer or the inner harbour until her regular turn came after the ships which had arrived before her; that there was not at that time a custom at the port of Odessa that "steamships under charterparty were not considered ready to receive cargo until after being moored alongside the quays;" and that the *Lizzie English* was ordered in her turn to a quay berth by the harbour master on January 8, 1889, and the defendants began to load her in the inner harbour on January 10, and completed her loading on January 15, and occupied in loading and discharging her altogether eleven days.

Under these circumstances the arbitrator found that the lay-days of the *Lizzie English* commenced on December 22, 1888, and expired on January 5, 1889, and that the defendants were liable to pay the plaintiffs 456*l.* 16*s.* for demurrage and detention under the terms of the charterparty.

Barnes, Q.C. (*W. English Harrison*, with him), for the defendants. The award is bad. The finding that "there was no practicable means of loading at Odessa except at or alongside a quay berth" shews that the lay-days under the charterparty did not begin to run till the vessel obtained a quay berth. The ground of the decisions in *Brown* v. *Johnson* (1) and *Tapscott* v. *Balfour* (2), in which it was held that the lay-days began to run from the time of getting into dock as opposed to that of obtaining a quay berth, was that the dock itself was the usual place of loading. At Odessa, on the contrary, when the vessel arrived there, there was no usual place of loading except at some quay. A ship, therefore, chartered to load at Odessa could not be deemed to have arrived till she obtained a loading berth at a quay.

[He referred to Carver on the Law of Carriage by Sea, s. 623, p. 622.]

Further, the time from December 22 to January 8 was not an

(1) 10 M. & W. 331. (2) Law Rep. 8 C. P. 46.

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unreasonable time for the master to wait in order to take the ship to a loading berth: *Nelson* v. *Dahl.* (1)

Cohen, Q.C. (*J. G. Witt*, with him), for the plaintiffs. The arbitrator has found that ships were loaded at Odessa as well in the outer harbour as in the inner harbour, and also, probably with reference to *The Steamship Co. "Norden"* v. *Dempsey* (2), that "there is no custom at Odessa by which steamships under charter are not considered ready to receive cargo until after being moored alongside the quay." Therefore, for the purposes of the charterparty, the outer harbour was one of the usual places of loading at Odessa, and the ship, having arrived there had arrived at Odessa within the meaning of the charterparty, and the lay-days began to run. No doubt the defendants had a right to order the vessel into the inner harbour if they preferred to do so. But after she got into either harbour the time within which she might obtain a quay berth was immaterial. After the lay-days commenced, their number being fixed, the defendants were responsible to the plaintiffs for any failure to load within the stipulated time, however occasioned, unless indeed their agents were prevented from loading by the conduct of the master. Here the failure to load within the lay-days was owing to the dock regulations, and the defendants are therefore liable to pay demurrage. This is the true effect of the exposition of the law given by Brett, L.J., in *Nelson* v. *Dahl.* (3) *Brown* v. *Johnson* (4) and *Tapscott* v. *Balfour* (5) are decisions in the plaintiffs' favour.

[He also cited Carver on the Law of Carriage by Sea, s. 627, p. 629; *Davies* v. *McVeagh* (6) and *Murphy* v. *Coffin.* (7)]

Barnes, Q.C., in reply. The contention of the defendants is supported by *Brereton* v. *Chapman* (8) and *Kell* v. *Anderson.* (9)

HUDDLESTON, B. I am of opinion that the decision of the arbitrator was correct. The Court has to consider the terms of the charterparty in connection with the facts found in the award. According to the charterparty the plaintiffs' steamship the

(1) 6 App. Cas. 38.
(2) 1 C. P. D. 654.
(3) 12 Ch. D. 580.
(4) 10 M. & W. 331.
(5) Law Rep. 8 C. P. 46.
(6) 4 Ex. D. 265.
(7) 12 Q. B. D. 87.
(8) 7 Bing. 559.
(9) 10 M. & W. 498.

Lizzie English was "to proceed to Odessa or so near thereunto as she might safely get and load." The arbitrator finds that on December 22 the plaintiffs brought the *Lizzie English* into the outer harbour at Odessa, "as near as she might safely get" to a loading berth, and gave the defendants notice that she was then ready to load. He finds that at Odessa it was impracticable to load the steamship except at some quay in either the outer or the inner harbour; that she might have been loaded at a quay berth in the outer harbour in which she arrived on December 22, but that she was in fact loaded at a quay berth in the inner harbour, which she did not reach till a subsequent date in January; that the defendants would only load her in the inner harbour as the cargo was stored there; and that owing to the rules of the port and its crowded condition when she arrived she could not have obtained a quay berth in either harbour earlier. It was conceded by the learned counsel for the plaintiffs that the defendants were entitled to order the vessel from the outer into the inner harbour where the cargo was, and that the time occupied in so moving her ought not to be reckoned as part of the lay days under the charterparty. Under these circumstances the question is whether the lay-days are to be computed from December 22, when the ship reached the outer harbour, or from the date at which she obtained a loading berth in the inner harbour?

The solution of this question is, I think, to be found in a passage in the judgment delivered by the present Master of the Rolls in *Nelson* v. *Dahl* (1): "If the place named be of the larger description, as a port or dock, the notice may be given, though the ship is not then in the particular part of the port or dock in which the particular cargo is to be loaded; but if the place named is of the more limited description, the notice cannot be given until the ship is at the named place, though the ship is in the port or dock in which the named place is situated."

Had the contract been that the ship was "to proceed to the inner harbour at Odessa and load," she could not be said to have arrived within the meaning of the charterparty till January 8, when she reached the inner harbour, and the arbitrator would

(1) 12 Ch. D. 568, at p. 581.

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Huddleston, B.

have been wrong. But the contract is that she is "to proceed to Odessa and load." This is satisfied by her arrival in the outer harbour at Odessa on December 22. The plaintiffs gave notice, as they were entitled to do, of their readiness to load on her arrival there on that day, and the lay-days are to be calculated, as the arbitrator has calculated them, from that day. The same distinction was drawn by my learned brother Mathew in his judgment in *Murphy* v. *Coffin*. (1)

MATHEW, J. I am of the same opinion. I think the conclusion arrived at by the arbitrator a perfectly correct one. It is unnecessary, and it would be pedantic, to repeat the clear and felicitous statements of the law which have been made by learned judges as from time to time they have been called upon to pronounce judgment in cases of this kind. The case of *Nelson* v. *Dahl* (2) contains a valuable epitome of all the previous authorities. In this case, it appears from the award that Odessa, the port to which this vessel had to go to load under her charter-party, was a port containing various places of loading, some at the quays in the outer, some at those in the inner harbour. Now, as was conceded by the learned counsel for the shipowners, the charterers were entitled, when the vessel arrived at Odessa, to require the captain to take her to some proper and usual berth to load. Had, therefore, the contract contained no stipulation as to the time within which the loading was to take place, it is obvious that the shipowners would have been exposed to the risk of the vessel being ordered to some crowded berth, where she might have been delayed for a considerable time. The loss and inconvenience which this delay might occasion to the shipowners would be a much more serious matter than any inconvenience likely to be caused to the charterers. One can conjecture, as is often the case as regards contracts of this and similar kinds, the course of the negotiations. The charterers say to the shipowners, "You must send your ship to Odessa." The shipowners reply, "There are several places at Odessa at which you will be entitled to call upon us to load. Some of these places may be crowded, and you may send our ship to one of these crowded places." The

(1) 12 Q. B. D. 87. (2) 12 Ch. D. 568; 6 App. Cas. 38.

charterers meet this by saying, "We consent to enter into an obligation in the charterparty to load the vessel within a certain time." It might be premature to attempt to unearth the principle upon which the interpretation of such stipulations in contracts of affreightment depends with a view to laying down a rule of general application, but I think that in the particular class of cases of which the present is an example, it may be stated to be the rule that where the port of loading or discharge named in the contract contains several places of loading or discharge, and the contract also names a time in which the vessel is to be loaded or discharged, the option of the merchant in the selection of the place of loading or discharge is to be exercised subject to the obligation into which he has entered that the cargo shall be loaded or discharged within the time named. Here the vessel arrived on December 22 at a point where she was at the disposition of the charterers. They had only to indicate the place to which she was to go for her cargo, and she would have been there immediately. The place of loading chosen by the charterers was a place where she could not load, as it was a part of the port then crowded by other ships, and she had to wait a considerable time. It appears to me that during all this time the charterers were contracting a liability under their contract that the ship should be loaded during the time specified in the charterparty. Accordingly the lay-days are to be computed from December 22, and the plaintiffs are entitled to the sum awarded to them by the arbitrator in respect of demurrage and detention. The motion will, therefore, be dismissed.

Motion dismissed.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *Lowless & Co.*

H. D. W.

1889
Oct. 26.

STEAMSHIP "COUNTY OF LANCASTER," LIMITED *v.* SHARP & CO.

Ship—Demurrage—Bill of Lading—Evidence of Contract by Consignee under Bill of Lading to be liable for Demurrage incurred at Port of Loading.

Goods were shipped on board the plaintiffs' vessel under a bill of lading in which the defendants were named as consignees. The property in the goods had not passed to the defendants by reason of the consignment within the meaning of the Bills of Lading Act, 1855, and they were, and were known by the plaintiffs to be acting as agents. By the bill of lading the cargo was to be delivered on payment of freight "and other conditions as per charterparty." By the charterparty demurrage was payable, and the plaintiffs had a right of lien in respect thereof. Before the arrival of the vessel at the port of discharge the plaintiffs informed the defendants that demurrage was payable in respect of delay at the port of loading. The defendants refused to pay demurrage, but paid the freight, and took delivery of part of the cargo, the plaintiffs exercising their lien for demurrage over the residue:—

Held, that there was no evidence of a contract on the part of the defendants to pay demurrage.

Wegener v. *Smith* (15 C. B. 285) considered.

Appeal by the plaintiffs from the Liverpool County Court.

The action was brought by the plaintiffs, the owners of the steamship *County of Lancaster*, against the defendants, the consignees named in the bill of lading for the conveyance of a cargo of china clay by that vessel from Fowey to Liverpool, to recover 39*l.* 15*s.* in respect of four days' demurrage and warehouse expenses. The defendants, as agents for one Rogers, had chartered the vessel from the plaintiffs for the voyage. By the charterparty freight was payable for the cargo at 6*s.* a ton, and the vessel was to be loaded and discharged at certain dates, and "if longer detained" demurrage was "to be paid at the rate of 2*l.* per day," and the plaintiffs were "to reserve to themselves the right of lien on the cargo for the recovery and payment of all freight, dead freight, demurrage, and all other charges whatever." In the bill of lading the cargo was stated to have been shipped by Rogers (the charterer) to be delivered to the defendants or their assigns "on payment of freight and other conditions as per charterparty."

It appeared that the defendants were employed as forwarding agents to effect the transhipment of the cargo of the *County of*

Lancaster on the arrival at Liverpool. Before she arrived the plaintiffs informed the defendants that three days' demurrage had been incurred at Fowey, and stated that unless the defendants would agree to pay it they would exercise their lien on the cargo for freight and demurrage. The defendants refused to pay the demurrage, but offered to procure a bond for the amount of it from their principal. On the arrival of the vessel the defendants tendered to the plaintiffs the amount of the freight. The plaintiffs at first refused to receive this sum except as paid on account of both freight and demurrage, but ultimately they accepted it as payment of the freight, and warehoused under their lien a part of the cargo, the value of which represented the amount of demurrage claimed. It was alleged that one day's demurrage was incurred at Liverpool owing to delay in unloading caused by the dispute.

The county court judge nonsuited the plaintiffs.

Joseph Walton, for the plaintiffs. Admitting that the property in the goods did not pass to the defendants by reason of the consignment within the meaning of the Bills of Lading Act, 1855, the fact that the defendants took delivery of the cargo, and paid freight for it at the rate mentioned in the bill of lading is conclusive evidence of an agreement by them to be bound by its terms: *Allen* v. *Coltart*. (1) The provision "freight and other conditions as per charterparty," incorporates the demurrage clause of the charterparty. The defendants therefore contracted to pay demurrage. In *Wegener* v. *Smith* (2) it was held that the receipt of a cargo by the indorsee of a bill of lading in the same form as in the present case was evidence from which a jury was justified in implying a contract on his part to pay demurrage, though he repudiated liability.

[MATHEW, J. The distinction between the present case and *Wegener* v. *Smith* (2) appears to be that here the repudiation of liability took place before, there not till after the delivery of the cargo.]

In any case there was some evidence of a contract, and the nonsuit cannot be sustained.

(1) 11 Q. B. D. 782.

(2) 15 C. B. 285; 24 L. J. (C.P.) 25.

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T. G. Carver, for the defendants. The judge found as a fact that no contract was entered into. In *Allen* v. *Coltart* (1), Cave, J., says, with reference to the early case of *Cock* v. *Taylor* (2), in which it was held that such a contract might be implied: "The ground of the decision is that when goods are deliverable to the holder of a bill of lading on certain conditions being complied with, the act of demanding delivery is evidence of an offer on his part to comply with those conditions, and the delivery accordingly by the master is evidence of his acceptance of that offer." Here the defendants' demand of delivery cannot be considered evidence of an offer to pay demurrage, for they expressly refused to pay it, and if such an offer could be implied under the present circumstances, the offer was refused by the plaintiffs, for they had recourse to their lien. The defendants were also agents for a principal, and the plaintiffs knew this: *Amos* v. *Temperley* (3); *Möller* v. *Young*. (4) At any rate the words "other conditions as per charterparty" do not render the defendants liable for demurrage at the port of loading: *Gray* v. *Carr* (5); *Güllischen* v. *Stewart*. (6)

Joseph Walton, in reply, referred to *Jesson* v. *Solly*. (7)

HUDDLESTON, B. In this case the county court judge, acting as both judge and jury, has nonsuited the plaintiffs, the shipowners, who brought an action to recover demurrage from the defendants, the consignees named in the bill of lading.

The facts are these. The vessel was kept on demurrage at Fowey, the port of loading. On her arrival at Liverpool the plaintiffs and the defendants discussed this matter, and it is clear that from the first the defendants plainly told the plaintiffs that they wanted delivery of the cargo, and that they would pay the freight but that they would not pay the demurrage. It is equally clear that the defendants were throughout only agents as regards the cargo, and that the plaintiffs knew this to be so. The defendants were so described in the charterparty, and when the plaintiffs raised the question of demurrage the defendants

(1) 11 Q. B. D. 782, at p. 785.
(2) 13 East, 399.
(3) 8 M. & W. 798.
(4) 24 L. J. (Q.B.) 217; 25 L. J. (Q.B.) 94.
(5) Law Rep. 6 Q. B. 522.
(6) 11 Q. B. D. 186; 13 Q. B. D. 317.
(7) 4 Taunt. 52.

referred them to their principal. In the result the plaintiffs delivered part of the cargo to the defendants on payment of freight for the whole cargo, and detained under their lien a quantity of the same approximate value as the sum claimed by them for demurrage and expenses.

Upon these facts the counsel for the plaintiffs has argued that a contract by the defendants to pay demurrage ought to be implied. He does not suggest that the Bills of Lading Act applies. His proposition is that the acceptance by the defendants of part of the cargo and the payment by them of freight at the rate mentioned in the bill of lading is, because this instrument incorporates the conditions of a charterparty one of which relates to the payment of demurrage, enough to shew a contract on their part to pay demurrage. The learned judge has held that this would be to imply a contract from the refusal to enter into a contract, and I agree with him.

Reference was made to *Wegener* v. *Smith* (1), but, as my learned Brother pointed out, in that case the consignee did not repudiate his liability to pay demurrage until after he had taken delivery of the cargo under the bill of lading. This appears from an observation made by Jervis, C.J., during the argument, and also from the judgment of Maule, J. (2) Here the repudiation took place before the delivery.

I think, therefore, that the nonsuit was right. The learned judge was right in holding, as a judge, that there was no evidence; as a jury, that there was not sufficient evidence, of the alleged implied contract. The appeal will, therefore, be dismissed.

MATHEW, J. I am of the same opinion. Had it been proved that any part of the cargo was received by the defendants on the terms of the bill of lading, there would, in my opinion, have been ample evidence of a contract on their part to pay demurrage. But, so far from this being the case, it appears that they took delivery on the express understanding that they agreed to pay freight, but did not agree to pay demurrage. *Wegener* v. *Smith* (1) was relied on as shewing that the receipt of the goods

(1) 15 C. B. 285; 24 L. J. (C.P.) 25. (2) 15 C. B. 285, at pp. 288, 289.

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and the payment of freight for them by the consignee at the bill of lading rate constituted conclusive evidence of a contract on his part to be bound by all the terms of the bill of lading. But *Wegener* v. *Smith* (1), when examined, proves not to be an authority for so strong a proposition. My learned Brother's comment on the case is confirmed by the account of the conduct of the consignee which is given by Jervis, C.J., in *Smith* v. *Sieveking*. (2) He appears to have taken delivery under a bill of lading which made demurrage payable, and then to have repudiated his liability to pay "demurrage accruing from his own delay at the port of discharge." In the present case I agree with my learned Brother that there was no contract on the defendants' part to pay demurrage.

Appeal dismissed.

Solicitors for plaintiffs: *Norris, Allen, & Chapman, for J. M. Quiggin & Brothers, Liverpool.*

Solicitors for defendants: *Hill, Dickinson, Dickinson, & Hill, Liverpool.*

H. D. W.

1889

Nov. 26.

WOOD *v.* BURGESS.

Trade Mark — Trade Name—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-ss.* (1), (2), *s.* 3, *sub-ss.* (1), (3)—*Offence of selling Goods to which a false Trade Description is applied — Mineral Water in Bottles bearing Name of Person not the Manufacturer — Intent to defraud Purchaser.*

The appellant and respondent being rival manufacturers of mineral waters, the respondent, without the authority of the appellant, filled with mineral water of his own manufacture certain bottles, the property of and moulded with the name of the appellant, with the intention of selling such mineral water to his (the respondent's) customers.

The respondent, being found in possession of certain of such bottles so filled, was summoned under ss. 2, 3, of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), for having in his possession for sale goods to which a false trade description, namely, the false name of the appellant, was applied.

The magistrate found that the respondent had no intent to defraud the purchasers of the water, and that he must, therefore, be taken to have "acted

(1) 15 C. B. 284; 25 L. J. (C.P.) 25. (2) 5 E. & B. 589, at p. 591.

innocently" within the meaning of s. 2, sub-s. (2), and on these grounds dismissed the summons:—

Held, that the magistrate was wrong, for that an intent to defraud the purchasers was not a necessary ingredient of the offence charged.

CASE stated by a metropolitan police magistrate.

The appellant, a mineral water manufacturer, was possessed, for the purposes of his trade, of glass bottles, on some of which were moulded his name and address, "T. Wood, 430, Hackney Road," and on others of which were moulded the words "This bottle is the property of Thomas Wood, 430, Hackney Road. No deposit charged." A considerable number of his bottles so moulded found their way into the possession of the respondent, who was also a manufacturer of mineral waters.

The respondent caused such bottles to be filled with mineral water of his own manufacture, and issued them so filled to his customers; but before issuing them he caused a paper label bearing his own name and in the following form

Burgess's
LEMON,
215, Brick Lane,
Bethnal Green Road.

to be affixed to the bottom of each bottle, and the delivery of such bottles to his customers was in every case accompanied by an invoice in the following terms: "Received from T. Burgess, Mineral Water Manufacturer." He had no authority from the appellant to use bottles bearing the appellant's name.

On January 15, 1889, there were found in the respondent's van, in the course of sale and delivery to the respondent's customers, certain of the appellant's bottles moulded, filled, and labelled as aforesaid.

The respondent was thereupon summoned under ss. 2, 3, of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), for "having in his possession for sale goods to which a false trade description, namely, the false name of T. Wood, was applied." (1)

(1) 50 & 51 Vict. c. 28, s. 2, sub-s. 1: "Every person who . . . (*d*) applies any false trade description to goods . . . shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act."

Sub-s. 2: "Every person who sells . . . or has in his possession for sale . . . any goods . . . to which any . . .

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The magistrate found as a fact that the name "T. Wood" was a false trade description within the meaning of s. 3, sub-s. 3, of the Act in this respect, that it was applied to goods which had not been manufactured by the appellant, and that the appellant had not authorized the use of his name; but he also found that the respondent had no intention to defraud his customers by representing his mineral waters to be of the appellant's manufacture. Being of opinion that in the absence of an intent to defraud the purchaser the respondent had "acted innocently" within the meaning of s. 2, sub-s. 2 (*c*), he accordingly dismissed the summons.

The questions for the opinion of the Court were:—

1. Whether selling mineral waters inclosed in bottles bearing the name of another manufacturer stamped upon them but without any intent to defraud the purchaser was an offence against the Merchandise Marks Act, 1887.

2. Whether an intent to defraud was a necessary ingredient in the offence under s. 2, sub-s. 2.

3. Whether the words "acting innocently" in sub-s. 2 had any different meaning from the words "without intent to defraud" in sub-s. 1.

false trade description is applied . . . shall unless he proves—

(*a*.) That having taken all reasonable . . . precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark, or trade description; and

(*b*.) That on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(*c*.) That otherwise he had acted innocently;

be guilty of an offence against this Act."

Sect. 3, sub-s. 1: "The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied."

Sub-s. 3: "The provisions of this Act . . . respecting goods to which a false trade description is applied shall extend . . . to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purposes of this enactment the expression false name or initials means, as applied to any goods, any name or initials of a person which

(*b*) are identical with . . . the name or initials of a person carrying on business in connection with goods of the same description, and not having authorized the use of such name or initials."

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Horace Avory, for the appellant. The words "or otherwise acting innocently" in s. 2, sub-s. 2 (*c*), must be read in connection with the earlier paragraphs in that sub-section, which deal with the case of a retail dealer who has innocently purchased goods with a false trade description applied to them, without any reason to suspect that such trade description is not genuine. And the other kinds of innocent action referred to must be something of the same nature, such for instance as acting under a belief of authority to use another person's name as a trade description of goods. But here the respondent knew that he was filling bottles bearing another person's name with water which was not of that person's manufacture, and that he was using that person's name without his authority. It may be that the words "or otherwise acted innocently" in sub-s. 2 mean precisely the same thing as "acted without intent to defraud" in sub-s. 1, but those latter words do not mean without intent to defraud the purchaser. The object of the Act is to protect the owner of the trade-mark, not the purchaser. And even if it were part of the object of the Act to protect purchasers, the precautions adopted by the respondent to prevent his immediate customer from being deceived would not exempt him from liability, for those precautions would not necessarily prevent the sub-purchasers from being deceived; they would presumably have no notice of the terms of the invoices sent to the respondent's customers, and the paper labels might become detached before the bottles reached the sub-purchasers' hands.

No counsel appeared for the respondent.

LORD COLERIDGE, C.J. I am of opinion that the magistrate was wrong in the view which he took, and that an intent to defraud the purchasers is not a necessary ingredient of the offence charged.

MATHEW, J. I am of the same opinion.

Case remitted to the magistrate.

Solicitor for appellant: *W. Webb.*

J. F. C.

1889
Nov. 29.

VALENTINI *v.* CANALI. (1)

Infant—Contract—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 62), *s.* 1.

By s. 1 of the Infants' Relief Act, 1874, "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

The plaintiff, an infant, agreed with the defendant to become tenant of a house, and to pay a certain sum for the furniture therein. The plaintiff paid the defendant part of this sum and occupied the house, and used the furniture during several months:—

Held, that the plaintiff was not entitled under the section to recover back the amount paid by him to the defendant.

APPEAL from the Woolwich County Court in an action remitted for trial from the Chancery Division in which the plaintiff claimed a declaration that a contract by which he agreed with the defendant to become tenant of a house, and to pay 102*l.* for the furniture therein, was void, and the return of 68*l.* paid by him on account, on the ground that he was an infant at the time when he entered into the contract. It appeared that the plaintiff had occupied the premises and used the furniture for some months. The judge found in the plaintiff's favour on the issue of infancy, declared the contract to be void, and ordered a promissory note given by the plaintiff for the balance due for the furniture to be cancelled, but refused to order the return of the sum paid. The plaintiff appealed.

J. R. Paget, for the plaintiff. By s. 1 of the Infants' Relief Act, 1874, "contracts entered into by infants for goods supplied" are declared to be "absolutely void." It is submitted that the effect of the section is to entitle the plaintiff to recover back money paid by him under a contract which has been pronounced void as upon a complete failure of consideration. [He referred to Pollock on Contracts, 3rd ed. p. 62; Addison on Contracts, 5th ed. p. 111.]

(1) Before Lord Coleridge, C.J., and Bowen, L.J., sitting as a Divisional Court.

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H. A. Forman, for the defendant, was not heard.

LORD COLERIDGE, C.J. I am of opinion that this appeal should be dismissed. Under the contract in question, which was one for his advantage, the plaintiff, an infant, undertook to pay the defendant a sum of money. He paid the defendant part of this sum, and gave him a promissory note for the balance. The judge satisfied himself that the plaintiff was an infant at the time when he entered into the contract, and, having satisfied himself of this, did, in my opinion, justice according to law. He set aside the contract, and he ordered the promissory note to be cancelled.

It is now contended that, in addition to this relief, the plaintiff was entitled to an order for the re-payment of the sum paid by him to the defendant as money paid under a contract declared to be void. No doubt the words of s. 1 of the Infants' Relief Act, 1874, are strong and general, but a reasonable construction ought to be put upon them. The construction which has been contended for on behalf of the plaintiff would involve a violation of natural justice. When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid. Here the infant plaintiff who claimed to recover back the money which he had paid to the defendant had had the use of a quantity of furniture for some months. He could not give back this benefit or replace the defendant in the position in which he was before the contract. The object of the statute would seem to have been to restore the law for the protection of infants upon which judicial decisions were considered to have imposed qualifications. The legislature never intended in making provisions for this purpose to sanction a cruel injustice. The defendant therefore could not be called upon to repay the money paid to him by the plaintiff, and the decision appealed against is right.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff: *A. P. Jackson.*

Solicitor for the defendant: *A. W. Stone,* Woolwich.

H. D. W.

1889
Nov. 30;
Dec. 2, 4.

RAVENSTHORPE LOCAL BOARD, APPELLANTS; HINCHCLIFFE, RESPONDENT.

Local Government Acts — Public Health (Buildings in Streets) Act, 1888 (51 & 52 *Vict. c.* 52), *s.* 3 — *Building Line* — "*Front Main Wall of House*" — *Unfinished House* — "*On either side thereof.*"

The respondent began to erect the front main wall of a new house in a street: at that time B. had raised the front main wall of a new house, which he was erecting on the same side of the street, to the height of five inches above the ground: it did not appear to what extent the other walls of B.'s house had been built, or that they were connected with the front main wall: there was a distance of about 300 or 400 feet between the two houses, and there was no house between them: the front main wall of the respondent's house was six feet nearer the roadway than that of B.'s house:—

Held, that the respondent had not erected any part of a house beyond the "front main wall of the house or building on either side thereof," within the meaning of s. 3 of the Public Health (Buildings in Streets) Act, 1888.

CASE stated by justices under 20 & 21 Vict. c. 43.

A complaint was laid under 51 & 52 Vict. c. 52, s. 3, which repeals s. 156 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and provides that "it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street beyond the front main wall of the house or building on either side thereof in the same street."

The complaint was that the respondent did on May 7, 1889, within the district of the Ravensthorpe Local Board, without the written consent of the said board, erect or bring forward a certain house or building in a certain street called Broomer Street beyond the front main wall of the house or building on either side thereof in the said street.

On the north side of Broomer Street there were buildings which were all set back twelve feet from the edge of the road: on the south side there was no house or building. Joseph Burton, the owner of a plot on the south side, submitted to the board a plan for a dwelling-house which was approved by the board on April 4. This house was shewn on the plan to be set back twelve feet from the road. The respondent, the owner of another plot on the south side, on March 26 submitted a plan shewing a house

set back only six feet from the road. This plan was disapproved on April 17.

Joseph Burton commenced to erect the house or building on his plot by laying the foundations of some or all of the outside walls on April 25, the excavations for such foundations having been previously made, and on April 29 the front main wall of the building was about five inches above the level of the ground, but not up to the level of the roadway.

On April 29 the respondent commenced to build the front main wall of the house or building on his plot, which projected six feet beyond the alleged front main wall of the building being erected by Joseph Burton.

The justices found that Broomer Street was a "street" within the meaning of the Act, but that the building in course of erection by Joseph Burton was not, at the time when the respondent's building was commenced, a house or building within the meaning of the Act, and they dismissed the summons.

The questions for the opinion of the Court were: (1.) Whether Broomer Street was a "street;" (2.) Whether the building commenced to be erected by Joseph Burton was a house or building within the meaning of s. 3 of the Public Health (Buildings in Streets) Act, 1888; and (3.) Whether the respondent had erected a house or building beyond the front main wall of the house or building on either side thereof in the same street, within the meaning of the above section.

R. Henn Collins, Q.C., (*Lawson Walton*, with him), for the appellants. The Act of 1888 alters the former provision of the Public Health Act, 1875, by introducing the word "erect," and was passed in consequence of the decision in *Williams* v. *Wallasey Local Board*. (1). The house in course of erection by Burton was "a house or building" within the meaning of the Act. It is not necessary that the building should be finished and complete. Therefore the wall which was commenced, and was raised above the level of the ground, was a "front main wall of a house or building" within the Act.

Forbes, Q.C., for the respondent. This was not a "street," for

(1) 16 Q. B. D. 718.

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there were houses only along one side of it: *Reg.* v. *Fulford.* (1) The Act contemplates something in the nature of a continuous line of buildings when it speaks of "the house or building on either side thereof." These buildings were about 300 or 400 feet apart, and not substantially adjoining each other, and the prohibition in the Act does not apply to them.

The Act was never intended to apply in such a case as this, for the effect would be to give a local board power to prescribe the building line of a street laid out for the first time, and to take away a man's private property without compensation. A local board has only power to prescribe the width of the roadway, and not the width of the footway, or the distance at which buildings must be set back from the roadway: *Robinson* v. *Local Board of Barton Eccles.* (2)

This erection, which was only just commenced, was not "a house or building," and had no "front main wall."

Henn Collins, Q.C., in reply. This was a "street," and the justices have so found: *Mayor of Portsmouth* v. *Smith.* (3)

FRY, L.J. The question on appeal in this case arises under s. 3 of the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), which provides that "it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street."

The facts of this case are shortly as follows: On March 25 last the plans of Hinchcliffe were sent in to the local board; these plans related to buildings to be erected on ground lying towards the west end of the street in question; on April 4 the plans of Burton were approved; these plans related to a house to be erected upon another plot in the same street, about 300 or 400 feet from Hinchcliffe's land; on April 17 Hinchcliffe's plans were disapproved by the board; on April 25 Burton began to erect his house by laying the foundations of some or all of the

(1) 33 L. J. (M.C.) 122. (2) 8 App. Cas. 798.
(3) 10 App. Cas. 364.

outside walls, the excavations having been previously made; on the same day Hinchcliffe began to dig the foundations of his house; on April 29 Hinchcliffe began to build the front main wall of his house; on that day the front main wall of Burton's house was about five inches above the level of the ground, but was not up to the level of the roadway. There is nothing in the case to shew that at that time the foundations of some of the walls of Burton's house were connected with the front main wall.

The first question is whether there was, under these circumstances, any "front main wall of a house or building" on Burton's land within the meaning of the Act. In my opinion there was not. There were indeed some beginnings of walls, but these did not in my opinion constitute a "house or building." There was not therefore on April 29 a front main wall of a house or building upon Burton's land.

There is another point in the case upon which I have not formed such a strong opinion. The Act forbids the erecting any house or building or any part thereof beyond the front main wall of the house, &c., on either side thereof in the same street. I think that the expression "house . . . on either side thereof" means a house within some near distance, within some degree of proximity, and not one standing some considerable distance away. Burton's house was 300 or 400 feet distant from Hinchcliffe's, and I doubt whether it could be said to be on either side of Hinchcliffe's within the meaning of the section. This appeal must be dismissed.

MATHEW, J. I am of the same opinion.

Judgment for respondent.

Solicitors for appellants: *Thompson & Light, for Watts & Son, Dewsbury.*

Solicitors for respondent: *Jaques & Co.*

W. A.

1889
Dec. 10.

HICKMAN *v.* BIRCH.

Revenue—Excise—Carriages—Hackney Carriage—Standing or plying for Hire—Omnibus—Customs and Inland Revenue Act, 1888 (51 & 52 *Vict. c.* 8), *s.* 4.

Sect. 4, sub-s. 1, of the Customs and Inland Revenue Act, 1888, imposes a duty upon every hackney carriage as thereinafter defined, and by sub-s. 3 a "hackney carriage" means "any carriage standing or plying for hire":—

Held, that an ordinary omnibus running along a fixed route is a "hackney carriage" within the meaning of the Act.

CASE stated by the magistrate of the Westminster Police Court under s. 33 of 42 & 43 Vict. c. 49.

The respondent was summoned to answer an information exhibited by order of the Commissioners of Inland Revenue by the appellant, an officer of Inland Revenue, which charged the respondent with keeping a carriage, such carriage having four wheels and being adapted to be drawn by two or more horses or mules, and not being a hackney carriage within the meaning of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), without having a proper licence in that behalf, contrary to the form of the statutes 32 & 33 Vict. c. 14, s. 27, and 51 & 52 Vict. c. 8, s. 4.

By s. 4, sub-s. 1, of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), the present duties in respect of carriages are imposed as follows:—

For every carriage as hereinafter defined:—

	£	*s.*	*d.*
If such carriage shall have four or more wheels and shall be drawn or be adapted or fitted to be drawn by two or more horses. . . .	2	2	0
For every hackney carriage as hereinafter defined		15	0

And by sub-s. 3 a "hackney carriage" is defined to mean "any carriage standing or plying for hire."

The respondent kept an omnibus which plied in the ordinary way for the conveyance of passengers between two defined places—a separate and distinct fare being paid for each passenger, which varied according to the place where the passenger was taken up.

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The respondent had an Excise licence authorising him to keep a hackney carriage, but not a licence at the 2*l.* 2*s.* rate for a four-wheeled carriage capable of being drawn by two horses.

The magistrate dismissed the information, and stated a case, the question for the opinion of the Court being whether the definition of a "hackney carriage" included the respondent's omnibus.

Sir E. Clarke, S.G. (*R. S. Wright*, with him), for the appellant. The respondent ought to have had a licence at the 2*l.* 2*s.* rate for his omnibus, which was a four-wheeled vehicle for two horses. An omnibus is not within the definition of a "hackney carriage" in s. 4, sub-s. 3, of the Act of 1888. The expression "standing or plying for hire" only applies to a carriage which stands or plies, as an ordinary cab, for hire by a person who hires the vehicle and during the hiring has the control thereof; it does not apply to such a vehicle as an omnibus, which runs for the conveyance of separate passengers at separate fares on a fixed route; a person does not "hire" an omnibus, he only pays a fixed sum for being allowed to ride in it: *Cloud* v. *Turfery*. (1)

Channell, Q.C., and *Courthope Munroe*, for the respondent, were not heard.

LORD COLERIDGE, C.J. I entertain no doubt whatever in this case. It is, in my opinion, clear that an omnibus does "stand or ply for hire," and is therefore a hackney carriage within the meaning of s. 4, sub-ss. 1 and 3, of the Customs and Inland Revenue Act, 1888. The magistrate was perfectly right in his decision. This attempt, made for the first time, to contend that an omnibus does not ply for hire and is not a "hackney carriage" but a private carriage, cannot succeed, and the appeal must be dismissed.

MATHEW, J. I am of the same opinion. If the legislature had intended to tax such a well-known thing as an omnibus on a different scale to other public vehicles, it is only reasonable to suppose that they would have mentioned it by name in the Act.

(1) 2 Bing. 318.

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It is not expressly mentioned, but it does come within the definition of a hackney carriage.

Appeal dismissed.

Solicitor for appellant: *Solicitor to Inland Revenue.*
Solicitors for respondent: *Close & Co.*

W. A..

Dec. 19.

[IN THE COURT OF APPEAL.]

FALCK *v.* AXTHELM.

Practice—Time for Pleading, Extension of—Order for Month "peremptory"—Particulars, Order for, Effect of—Order XIX., *r.* 8.

Order XIX., r. 8, provides that the party at whose instance particulars have been delivered under a judge's order shall, unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons.

Upon an application by a defendant for further time for delivering defence an order was made giving him a month peremptory. The defendant subsequently obtained an order for particulars:—

Held, that Order XIX., r. 8, did not apply, and that the defendant was not by reason of the order for particulars entitled to any time beyond the month given by the peremptory order.

APPEAL from an order of the Queen's Bench Division (Huddleston, B., and Stephen, J.) affirming the order of a judge at chambers.

The facts were as follows. The action was brought to recover a liquidated amount for commission, the writ being specially indorsed. On an application by the defendant for a further extension of time for delivering defence, a master on August 1 made an order giving the defendant "a month peremptory, pleading as of 12th August." The defendant subsequently applied at chambers for an order for further and better particulars of the claim, and on August 9 an order was made by a master that the plaintiff should within fourteen days deliver the best particulars he could give, and that all further proceedings in the action should be stayed until the delivery of such particulars. Particulars were delivered by the plaintiff in pursuance of the order on August 21. On September 5, no defence having then been delivered, the plaintiff signed judgment in default of pleading

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for the amount claimed. The defendant applied to a master at chambers to set aside the judgment as irregularly signed, on the ground that by virtue of Order XIX., r. 8, he had the same length of time for pleading after the delivery of the particulars that he had at the return of the summons for particulars, and therefore the time for delivering defence had not expired when the judgment was signed. The master refused to set aside the judgment, and the judge at chambers on appeal affirmed his decision.

Lynden Bell, for the defendant. The provisions of Order XIX., r. 8, apply to this case, and therefore the defendant had as much time for delivering defence after the delivery of particulars as he had on the return of the summons, i.e., till September 12. There is nothing in the term "peremptory" as used in the previous order inconsistent with the application of Order XIX., r. 8. The term "peremptory" only imports that, in the absence of very special circumstances, no further application for extension of time will be entertained. Parke, B., in *Beazley* v. *Bailey* (1) said that the order peremptory is only "the expression of the then opinion of the judge" and is not absolutely final. The time given by such an order is therefore, like time originally given by the rules or given by an ordinary order extending the time, subject to the provisions of Order XIX., r. 8, the general scope of which is that the party who has a certain time for pleading is not to have the time during which he is waiting for particulars counted against him.

Horne Payne, Q.C. (*G. Spencer Bower*, with him), for the plaintiff, was not called upon.

LORD ESHER, M.R. I think the order of the Divisional Court was right. What has been said about the effect of Order XIX., r. 8, is in general correct enough, but it does not apply where, as in this case, there is a previous order inconsistent with such effect, and which would be altered and done away with by the operation of the rule as contended for. The defendant in this case, being in default, or fearing that he would be so, made an

(1) 16 M. & W. 58.

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Lord Esher, M.R.

application at Chambers for an extension of the time for pleading, and an order was made giving him a month peremptory. What is the meaning of "peremptory" in such an order? It was argued that it has really no meaning, and a case was cited to shew that to be so. I think the real meaning is that the order is peremptory that the defendant shall plead within one month unless the order is altered. In the case cited it was argued that the judge could not alter the order on fresh circumstances being shewn to him. That argument goes too far. But, if the order remains unaltered, it is an order for a month peremptory; that the defendant shall have one month to plead and no more. That order was made, and no application was ever made for any alteration of it. The defendant's proper course would have been to ask for an alteration of that order when he got the order for particulars. Therefore the order stood for a month peremptory from August 1, which meant that, if the defendant did not plead by September 1, judgment against him might be signed. If a defendant, who without an indulgence would have been in default already, and who has got an order for indulgence on such terms, gets subsequently an order for particulars, he takes it subject to the previous order. He does not get so many more days to plead. If he did, it would be making the order for particulars by implication alter the previous peremptory order, though it might never have been mentioned to the master when he was making the order for particulars. It was urged that the plaintiff ought to have asked to have some words put in the order for particulars, preventing its having that effect. I do not think it was for the plaintiff to do so. It was for the defendant to have asked for an alteration of the order that he must plead by September 1. For these reasons I think the order of the Court below was correct, and that this appeal should be dismissed.

LINDLEY, L.J. I agree. The defendant, requiring further time to plead, applied at chambers for an extension of time, and thereupon an order was made on August 1 giving him a month peremptory. The first question is as to the meaning of that order. I do not think it can mean that the order cannot be varied under any circumstances. It means that the time thereby

granted shall not be further extended, unless under special circumstances some further order is made varying the former order. The order cannot be varied by implication by a subsequent order, made without calling the master's attention to it. The defendant, who had got that order, subsequently applied for an order for particulars. He did not call attention on such application to the previous order for a month's time peremptory; he got his order for particulars without any reference to it. It would be contrary to principle and fair dealing to construe Order XIX., r. 8, as having the effect of setting aside or altering a previous peremptory order made with regard to the time for pleading, which is inconsistent with it. This is the real answer to this appeal.

LOPES, L.J. In my opinion Order XIX., r. 8, does not apply where it is inconsistent with a peremptory order as to time for pleading made previously to the making of the order for particulars. That is a sufficient answer to this appeal, for, if so, the rule does not apply to this defendant, inasmuch as, if applicable, it would have an effect inconsistent with the previous order. With regard to the meaning of the word "peremptory" in the order, I take it to mean that the order for extension of time is given on the footing that it is to be final unless some very special and urgent circumstances are brought forward as a reason for altering it. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Emanuel & Simmonds.*

Solicitors for defendants: *Hughes, Masterman, & Rew.*

E. L.

1889
Dec. 10.

THE QUEEN *v.* VICE-REGISTRAR OF OFFICE OF LAND REGISTRY.

Land Charges Registration—Charges under Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 257—*Registration—Land Charges Registration and Searches Act*, 1888 (51 & 52 *Vict. c.* 51), *ss.* 4 *and* 10.

By s. 257 of the Public Health Act, 1875, certain expenses incurred by local authorities, for the payment of which the owner of the premises in respect of which they were incurred is liable, may be recovered from the owner, and until recovery are a charge upon such premises:—

Held, that such expenses are not "land charges" within the meaning of the Land Charges Registration and Searches Act, 1888, so as to require registration under that Act.

RULE NISI calling upon the Vice-Registrar of the Office of Land Registry to shew cause why a writ of mandamus should not issue directed to him commanding him to register under the Land Charges Registration and Searches Act, 1888, the following charges:—A charge upon lands in the parish of Sneinton, in the borough of Nottingham, dated July 31, 1888, by virtue of the statute 38 & 39 Vict. c. 55 (the Public Health Act, 1875), s. 257. And a charge upon lands in the parish of Lenton, in the same borough, dated February 20, 1889, by virtue of the same section of the same statute.

The mayor, aldermen, and burgesses of the borough of Nottingham, through the town clerk, applied to the Vice-Registrar of the Office of Land Registry to register two charges in the borough arising under s. 257 of the Public Health Act, 1875 (38 & 39 Vict. c. 55). The vice-registrar refused to register these charges, on the ground that they were not land charges within the meaning of the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51). (1) The corporation

(1) The Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), by s. 4 defines a "land charge" to be "a rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any Act of Parliament, for securing to any person either the moneys spent by him or the costs, charges, and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an Act of Parliament, and a charge under the thirty-fifth section of

did not desire to register these charges, but only to obtain a decision whether they were such charges as required registration under the above Act. Thereupon this rule was obtained.

Sir R. Webster, A.G. (*Griffin*, with him), shewed cause. The Act of 1888 does not apply to such charges as these. The definition in s. 4 of a "land charge" may be wide enough to cover these charges, but when the provisions of s. 10, which prescribe the mode of registration, are looked at it is clear that the definition clause must be given a narrower meaning. The provisions of s. 10 are inapplicable to such charges as these, and so also are the rules and forms which have been made under the authority of s. 18: rule 4, and form 3. (1)

The provisions of s. 10 are only applicable to charges which have been created on the application of an owner of the premises charged, and not to charges imposed by statute, against the will of the owner of the premises charged: the section speaks of "the person by or on behalf of whom the application was made pursuant to which the land charge was created." The definition in s. 4 therefore must only be applied to such charges as have been created pursuant to an application. The two Acts which are expressly mentioned in the definition give power to create charges only after an application has been made.

R. S. Wright, in support of the rule. This application is a convenient mode of obtaining a judicial interpretation of a

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the Land Drainage Act, 1861, or under the twenty-ninth section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot."

Sect. 10 provides that: "A register, in this Act called the register of land charges, shall be kept at the Office of Land Registry, and land charges may be registered therein in the prescribed manner:—

"(1.) In the case of freehold land, in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge.

"(2.) In the case of copyhold land, in the name of the tenant on the court rolls at the time of the creation of the land charge.

"Provided that where the person by or on behalf of whom the application was made pursuant to which the land charge was created was beneficially entitled to a lease for lives or a life at a rent or to a term of years the land charge shall be registered also in the name of that person."

(1) Land Charges Rules, 1889, W. N. (1889) p. 32.

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statute, which is permitted by the Court: *Reg.* v. *Postmaster General.* (1) The applicants do not desire the issue of this mandamus, but they do desire to know whether it is necessary for them to register these charges.

Such charges as these are exceedingly numerous and often of very small amounts. The cost of registering them all would be a very serious burden. It was not the intention of the Act to affect them, but only to deal with charges created voluntarily upon the application of owners; this appears from the words of s. 10, already referred to. The definition in s. 4 does not in terms apply to charges "imposed by Act of Parliament," but only to charges "otherwise than by deed, under the provisions of any Act of Parliament." The rules and forms under this Act are not really applicable to, or of much use with regard to these charges.

The charges are not within the mischief aimed at by this statute, and its provisions ought not to be so widely construed as to include them: *Meux* v. *Jacobs.* (2) The definition in s. 4, if the narrower construction is placed upon it, will cover all charges created voluntarily under the provisions of any Act of Parliament.

LORD COLERIDGE, C.J. We are of opinion that this rule ought to be discharged. It seems to me that under the Land Charges Registration and Searches Act, 1888, the definition of a land charge contained in s. 4 is certainly wide enough with some straining to include the charges in question in this case so as to bring them within the provisions of the Act. When, however, we come to look at s. 10, which deals with the manner in which land charges are to be registered, it seems clear that such charges as these were not intended to be registered. This part of the Act does not contemplate such charges as these, for the provisions of s. 10 direct that the name of the person beneficially entitled to the first estate of freehold shall be registered, and goes on to speak of "the person by or on behalf of whom the application was made pursuant to which the land charge was created." These provisions appear to imply that no land charges are within this s. 10, except such as created in consequence of an application, and that

(1) 1 Q. B. D. 658; 3 Q. B. D. 428. (2) Law Rep. 7 H. L. 481, 493.

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those which are created without any application and irrespective of the wish of the owners are not within the Act.

Therefore, although the wide terms of the definition in s. 4 at first seem to include these charges, the provisions of s. 10, which direct the mode of registration, shew that a totally different kind of charge was contemplated by the Act, and it is reasonable to construe the Act so as not to include these charges among the land charges which are directed to be registered.

MATHEW, J. I am of the same opinion.

Rule discharged.

Solicitors for applicants: *Sharpe, Parkers, Pritchard, & Sharpe.*
Solicitors for respondent: *Solicitor to the Treasury.*

W. A.

REG. *v.* JUSTICES OF KENT.

Dec. 11.

Weights and Measures — False Weights—Property of the General Post Office —Postmaster also a Trader—Jurisdiction of Justices—Weights and Measures Act, 1878 (41 & 42 *Vict. c.* 49), *ss.* 25, 59.

By s. 25 of the Weights and Measures Act, 1878, every person who uses or has in his possession for use for trade any scale which is false or unjust shall be liable to a fine; and by s. 59, where any scale is found in the possession of any person carrying on trade within the meaning of the Act or on the premises of any person which are used for trade such person shall be deemed for the purposes of the Act, until the contrary is proved, to have such scale in his possession for use for trade.

An information was laid, under s. 25, against the master of a post office, who also traded as a baker upon the same premises, for having in his possession for use for trade an unjust scale. The scale belonged to the Post Office, and was the property of the Crown :—

Held, upon an application for a writ of prohibition, that the justices had no jurisdiction to hear and determine the matter of the information, because the provisions of the Act did not apply to scales which were the property of the Crown.

ORDER NISI calling upon certain justices of the county of Kent to shew cause why a writ of prohibition should not issue, prohibiting them from proceeding to hear and determine the matter of an information laid against one A. H. Nicholls, of the post office, in the parish of Down, in Kent.

The information stated that Nicholls, on a certain day, and at

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the place aforesaid, had in his possession for use for trade a certain scale which then and there was false, contrary to the statute in such case made and provided.

The applicant Nicholls was master of the post office at Down, and on the same premises carried on the trade of a baker. The inspector of weights and measures visited the premises, and found on the counter of the shop a scale belonging to the Post Office, which upon inspection proved to be false. The above information was then laid against Nicholls under s. 25 of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49). (1)

The order nisi for a prohibition was obtained, on behalf of the Crown, upon the ground that the justices had no jurisdiction in the matter, or to hear and determine the information, by reason that the scale was the property of the Crown and was not in the possession of the applicant for use for trade, but was in his possession as and being an officer of the Post Office and expressly and exclusively for use for the purposes of Her Majesty's Post Office, and that the Crown and its property were not subject to the provisions of the statute.

Poland, Q.C., and *R. S. Wright*, shewed cause. The justices had jurisdiction to hear and determine this information. The postmaster carried on the trade of a baker and the scales and weights were in his possession. Under the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), the justices had jurisdiction to determine whether they were false and unjust, and whether they were in his possession for use for trade. A baker is, by 6 & 7 Will. 4, c. 37, bound to sell bread by weight, and to have in his

(1) The Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 25, provides that "Every person who uses or has in his possession for use for trade any weight, measure, scale, balance, steelyard, or weighing-machine, which is false or unjust, shall be liable to a fine not exceeding five pounds."

Sect. 59, provides that: "Where any weight, measure, scale, balance, steelyard, or weighing-machine, is found in the possession of any person carrying on trade within the meaning of this Act, or on the premises of any person which, whether a building or in the open air, whether open or enclosed, are used for trade within the meaning of this Act, such person shall be deemed for the purposes of this Act, until the contrary is proved, to have such weight, measure, scale, balance, steelyard, or weighing-machine in his possession for use for trade."

shop the weights and scales necessary for weighing bread. By s. 59 of the Act of 1878 where any weights or scales are in the possession of a person carrying on a trade such person shall be deemed, until the contrary is proved, to have such weights or scales in his possession for use for trade. The justices had clearly jurisdiction to determine whether they were in his possession for trade and to impose a fine if they were. If the scales and weights are the property of the Crown the justices cannot order them to be forfeited, but that does not prevent them from fining the trader, who uses them, in accordance with the provisions of the Act. The subject-matter of this information is within the jurisdiction of the justices, and a prohibition cannot issue merely upon the supposition that, in determining it, they may exceed their jurisdiction: *Farrow* v. *Hague* (1); *Reg.* v. *Herford* (2); *Re Appledore* (3); *Reg.* v. *Higgins.* (4)

Sir R. Webster, A.G. (*Casserley*, with him), for the Crown, in support of the order. The Act does not apply to Post Office weights and scales, because it does not bind the Crown, and none of its provisions apply to weights and scales the property of the Crown. It is admitted that these weights and scales are the property of the Crown; therefore the justices had no jurisdiction to hear and determine any information relating thereto. The offence charged against the applicant is that he had them in his possession, and a prohibition will properly issue.

If the applicant has sold bread by unjust scales and weights he can be proceeded against under the provisions of 6 & 7 Will. 4, c. 37.

LORD COLERIDGE, C.J. I am of opinion that this order must be made absolute. I entirely admit that the rule has been correctly stated that if justices have jurisdiction over the subject-matter of the proceedings before them, a prohibition cannot be issued upon the ground that they may make a mistake in law in exercising their jurisdiction. This appears quite clearly from all the cases cited on behalf of the respondents. But it is necessary that the subject-matter of the inquiry should be within their

(1) 3 H. & C. 101.
(2) 3 E. & E. 115.
(3) 8 Q. B. 139.
(4) 8 Q. B. 149, note.

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Lord Coleridge, C.J.

jurisdiction. If it is not within their jurisdiction, then a prohibition must go.

In this case the information was laid under the provisions of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), of which ss. 25 and 59 are the material sections for our consideration. These sections have already been read several times, and it is enough therefore, to say that this Act is directed broadly against the use of unjust weights and measures, and that very strong and sweeping words are used. Penalties are imposed by s. 25 upon any person using or having in his possession for trade unjust scales and weights. Now you cannot consider s. 25 without also considering s. 59, for they are not separate and distinct parts of the Act, but are both directed to the same point and must be read together. By s. 59 a presumption is created that any weights or scales found in the possession of a person who carries on a trade, or on the premises of any person which are used for trade, are in the possession of such person for use for trade, until the contrary is proved.

Then arises the question whether the legislature ever intended that weights and measures supplied by the Post Office, and seen and kept correct from time to time by government inspection, should be included within the provisions of the Act, and be subject to the jurisdiction of the inspector of weights and measures. I am clearly of opinion that the legislature did not so intend. The consequences of a contrary construction have been forcibly pointed out during the argument. This is an information for having in his possession unjust scales. Any sub-postmaster, who also carried on any trade would be presumed, by s. 59, to have the Post Office scales and weights in his possession for use for trade, the inspector might inspect them, seize them, and lay an information against the sub-postmaster and throw upon him the onus of proving that he did not use them in his trade. In this case the defendant is not charged with any fraudulent use of these scales and weights, such as might by possibility be a proper matter for the justices to inquire into. That question is not before us. The question is whether the fact of a postmaster having in his possession weights and scales supplied to him by the Post Office for Post Office purposes, can

by any possibility give jurisdiction to the justices to inquire into the falsity or otherwise of those scales or weights. I think clearly not. An inspector might, if the contention of the respondents were correct, claim the right to inspect the weights and scales at all post offices kept by persons who were also traders, and to summon all such postmasters if the weights were incorrect, and compel them, under the provisions of s. 59, to prove that they were not in their possession for use for trade, when they could not give evidence on their own behalf. That can never have been intended by the legislature. It is admitted here that these weights and scales were in the possession of the applicant as postmaster, and that they belonged to the Post Office. Therefore, this Act does not apply to them, and the justices have no jurisdiction to enter upon this inquiry.

MATHEW, J. I am of the same opinion. I think that it is clear that the legislature never meant to treat the weights and scales of a government department as being within the scope of the Act. The provisions of this Act are highly penal. They substitute, as is the modern fashion, presumption for evidence. By s. 59 a presumption is raised against persons having in their possession incorrect weights and scales, which they are compelled to rebut. I am not all pressed by the argument that a decision that Post Office scales and weights are not within the Act, will create a difficulty in the prosecution of postmasters who use those scales and weights in their own trade. If they knowingly use such scales and weights, when they are incorrect, in their own trade, the public are adequately protected by other remedies than those given by this Act. The necessary consequences of holding that such scales and weights are within the purview of the Act would be that the perfectly innocent user of such weights and scales might be punished as criminal, that the whole work of a post office might be stopped by seizure of the weights and scales, and that the justices would have power to order the property of the Crown to be forfeited.

It is said that the justices would never be asked to make such an order, and that they would not make it. We have, however, to see what weights and scales are intended to be dealt with by

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the Act, and, if that power is conferred upon justices, it is an indication that other weights and measures than the property of the Crown were those with which the Act was dealing. For those reasons I think that the prohibition must go.

Order absolute.

Solicitor for applicant: *Solicitor to the Post Office.*
Solicitors for respondent: *Latter & Willett*, Bromley.

W. A.

Nov. 26, 27; *Dec.* 18.

KNILL *v.* TOWSE.

County Council—Election of—Registration—Elector registered in more than one Division—Right of voting—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 2, *sub-ss.* (1), (2) (*e*) *and* (4), *s.* 75—*County Electors Act*, 1888 (51 *Vict. c.* 10), *s.* 7, *sub-ss.* (1), (2), (4), *and* (5)—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 44, *sub-s.* (1)—*s.* 45, *sub-s.* (6)—*s.* 51, *sub-s.* (2).

In elections of county councillors under the Local Government Act, 1888, an elector, although duly registered under the County Electors Act, 1888, in more than one electoral division of the same county, is not entitled to vote in more than one electoral division of the same county.

APPEAL from county court.

At an election of county councillors for the administrative county of London, which took place in January, 1889, the defendant was the presiding officer at one of the polling-stations in the city of London electoral division of the said county. The plaintiff, as was admitted by the defendant, was duly registered as a county elector for the said county in the registers both of the city of London division and of the Greenwich division. The plaintiff demanded of the defendant a ballot paper to enable him to vote at the election of councillors for the city of London division, at the same time informing him that he had already voted at the election of councillors for the Greenwich division. The defendant refused to supply the plaintiff with a ballot-paper on the ground that he was not entitled to vote in more than one electoral division of the county. The plaintiff thereupon brought an action in the City of London Court to recover damages for such refusal. The judge held that the defendant's refusal was

right, and gave judgment accordingly. From that decision the plaintiff appealed.

Finlay, Q.C. (*Russell Griffiths*, with him), for the plaintiff. The legislature presumably intended to place both classes of county elections, those for members for the parliamentary county and those for councillors for the administrative county, on the same footing; and as for the purposes of the former a voter may be registered and vote in more than one division of the same county, so it was intended that a voter should equally have a right to be registered and vote in more than one electoral division for the purposes of the latter. (1)

(1) 51 & 52 Vict. c. 41, s. 2 (1): "The council of a county and the members thereof shall be constituted and elected and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough divided into wards, subject nevertheless to the provisions of this Act, and in particular to the following provisions, that is to say:"—

(2.) "As respects the aldermen or councillors—

(*e.*) the divisions of the county for the purpose of the election of county councillors shall be called electoral divisions and not wards."

(4.) "As respects the electors of the county councillors—the persons entitled to vote at their election shall be, in a borough, the burgesses enrolled in pursuance of the Municipal Corporations Act, 1882, and the Acts amending the same, and elsewhere the persons registered as county electors under the County Electors Act, 1888."

Sect. 75: "For the purpose of the provisions of this Act with respect to county councils . . . . the following portions of the Municipal Corporations Act, 1882, namely, . . . Part Three . . . shall, so far as the same are consistent with the provisions of this Act, apply as if they were herein re-enacted . . . in such terms and with such modifications as are necessary to make them applicable to the said councils."

51 Vict. c. 10, s. 7 (1): "The clerk of the peace of every county shall make up a register of all persons registered as burgesses or county electors in the county, both for the county and for each electoral division into which the county is divided for the purpose of election of the county authority."

(2) "The registration of Electors Acts, and sections forty-five, forty-eight, and seventy-one of the Municipal Corporations Act, 1882, shall apply, for the purposes of this section, with the substitution of clerk of the peace for town clerk, and of county register and division register for burgess roll and ward roll respectively, and of electoral division for ward, and of county fund for borough fund."

(4.) "Provided that nothing in this section shall prevent a county elector from being registered in more than one division register."

(5.) "Where in pursuance of section four of the Registration Act, 1885, the revising barrister has power to erase the name of any person as a parliamentary voter from division one of the occupiers list, such barrister, in lieu of erasing the name, shall place

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By s. 2, sub-s. (4), of the Local Government Act, 1888, the persons entitled to vote at the election of county councillors elsewhere than in a borough are defined to be "the persons registered as county electors under the County Electors Act, 1888." Here the appellant was admitted to be registered for the city of London division under that Act, he was therefore entitled to vote for that division, and none the less because he had already voted for the Greenwich division. Sect. 7, sub-s. (1), of the County Electors Act, 1888, provides for the making up of the register of

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an asterisk or other mark against the name, and, in printing such lists, the name shall be numbered consecutively with the other names, but an asterisk or other mark shall be printed against the name, and a person against whose name such asterisk or other mark is placed shall not be entitled to vote in respect of such entry at a parliamentary election, but shall have the same right of voting at an election of a county authority as he would have if no such mark were placed against his name."

45 & 46 Vict. c. 50, s. 44 (1): "Where the whole or part of the area of a borough is co-extensive with or included in the area of a parliamentary borough, the lists of burgesses are to be made out and revised, and claims and objections relating thereto are to be made, in accordance with the provisions of the Parliamentary and Municipal Registration Act, 1878."

Sect. 45 (6): "A burgess shall not be enrolled in more than one ward roll."

Sect. 51 (2): "No person shall subscribe a nomination paper in or for more than one ward, or vote in more than one ward."

41 & 42 Vict. c. 26, s. 28 (14): "Where the name of any person appears to be entered more than once as a parliamentary voter on the lists of voters for the same parliamentary borough, or more than once as a burgess on the burgess lists for the same municipal borough, the revising barrister shall inquire whether such entries relate to the same person, shall on proof being made to him that such entries relate to the same person shall retain one of the entries for voting, and place against the other or others a note to the effect that the person is not entitled to vote in respect of the qualification therein contained for the parliamentary borough or for the municipal borough, as the case may be, he being on the list for voting in respect of another qualification."

48 Vict. c. 15, s. 4 (9): "Sub-section fourteen of section twenty-eight of the Parliamentary and Municipal Registration Act, 1878, shall not apply to parliamentary counties, and in substitution for it the following provision shall have effect:—

(*a.*) Where the name of a person appears to be entered more than once as a parliamentary voter on the lists of voters for the same parliamentary county, the revising barrister shall inquire whether such entries relate to the same person, and, on proof that such entries relate to the same, shall retain one entry and erase the others."

county electors, and by sub-s. (4), "Nothing in this section shall prevent a county elector from being registered in more than one division register;" but it would be idle to suppose that the legislature contemplated an elector's having the right to be on more than one division register, without also contemplating his having the right to vote for more than one division.

By sub-s. (5) of the same section, where a voter's name is entered more than once on the lists the revising barrister is to place an asterisk against all the entries of such name except one, but, although such asterisk is to prevent such voter from voting in respect of the entries so marked at a parliamentary election, it is expressly provided that he "shall have the same right of voting at an election of a county authority as he would have if no such mark were placed against his name." That proviso confers upon the voter the right of voting for each division for which he is registered.

The respondent relies on s. 75 of the Local Government Act, 1888, which incorporates, so far as the same is consistent with the provisions of the Act, Part III. of the Municipal Corporations Act, 1882, by s. 51 of which it is provided that, "No person shall vote in more than one ward." Then it is said that by virtue of s. 2, sub-s. (1), and sub-s. (2) (*e*) of the Local Government Act, 1888, and s. 7, sub-s. (2), of the County Electors Act, 1888, the electoral division of a county is treated for all purposes as equivalent to a ward, and that consequently no person may vote in more than one electoral division of a county. But when Part III. of the Municipal Corporations Act, 1882, is looked at as a whole, it will be seen that s. 51 is merely in aid of s. 45 of that Act, by sub-s. (6) of which "a burgess shall not be enrolled in more than one ward roll;" and s. 51 was intended to provide for a case in which a voter's name had by mistake been improperly entered on more than one ward roll. But a voter is entitled to be registered on more than one division register of a county, therefore s. 51 has no application to county council elections. If it did apply it would be inconsistent with s. 2, sub-s. (4), of the Local Government Act, 1888, and it was only in so far as it was not inconsistent with provisions of that Act that Part III. of the Municipal Corporations Act was incorporated at all.

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Vaughan Williams, Q.C. (*J. V. Austin*, with him), for the defendant. It was part of the scheme of Parliament in the County Electors and Local Government Acts of 1888 to deal in the same manner with all administrative elections, whether the administrative area was a borough or a county. The electoral divisions of a county are to all intents and purposes wards of the county, they differ from wards only in name. Sect. 7 of the former Act, which deals with the making up of the county register, provides by sub-s. (2) that the Registration of Electors Acts, and certain sections of the Municipal Corporations Act, 1882, shall apply for the purposes of that section, "with the substitution . . . of county register and division register for burgess roll and ward roll respectively, and of electoral division for ward." And it was enacted by s. 2 of the Local Government Act, 1888, that "the council of a county shall be elected in like manner, and be in the like position in all respects, as the council of a borough divided into wards," subject to the provision (amongst others) of sub-s. (2) (*e*), that "the divisions of the county for the purpose of the election of county councillors shall be called electoral divisions and not wards." Then, inasmuch as by s. 51 of the Municipal Corporations Act, 1882 (which is incorporated by s. 75 of the Local Government Act), no person shall vote in more than one ward, it follows that for the purpose of the election of county councillors no person may vote in more than one electoral division. And this is in no way inconsistent with s. 2, sub-s. (4), of the Local Government Act, for there is no inconsistency in saying that the persons on the register shall be entitled to vote, and in saying at the same time that they shall only exercise their right subject to a certain qualification, namely, that they must not vote twice.

Sub-s. (4) of s. 7 of the County Electors Act was probably inserted for one or other of two reasons. It may have been intended to deal with the district councils referred to in sub-s. (3), the creation of which was contemplated at the time of the passing of that Act, but was subsequently abandoned. But the more probable reason is that it was intended to act as an instruction to the clerk of the peace of the county as to the mode of the making up of the county registers. Under sub-s. (1) he has to make up

two sets of lists of electors, an aggregate list for the whole county, and several lists for each electoral division, and it was thought that it might lead to mistakes if the clerk of the peace were to assume the duty of dealing with the duplicate entries. That is to be left to the revising barrister, whose duty in respect of them is partly provided for by sub-s. (5). But in order to make that sub-section clear it is necessary to look at the earlier Registration Acts. By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), which applied only to boroughs, it was provided by s. 28, sub-s. (14), that where a person's name appeared more than once, either on the list of parliamentary voters or on the list of burgesses, of a borough, the revising barrister was to retain one entry for voting, and place against the others a note to the effect that such person was not entitled to vote in respect of them. Some process of that kind was necessary in those boroughs which were both parliamentary and municipal, for the reason that simple erasure of the duplicate entries might have had the effect of disfranchising the voter in respect of one of his franchises. On the other hand by the Registration Act, 1885 (48 Vict. c. 15), which applied only to counties, it was provided by s. 4, sub-s. (9), that the duplicate entries should not be marked with a note, but should be erased, there being at that time only one franchise in counties, namely, the parliamentary franchise. But when in 1888 there came to be contemplated the creation of an administrative franchise in counties, the erasure system was no longer applicable. Accordingly s. 7, sub-s. (5), of the County Electors Act proceeded to deal, so far as the parliamentary franchise was concerned, with duplicate entries by means of the asterisk system there mentioned. The reason why that sub-section was confined in its operation to the parliamentary franchise, probably was that the Local Government Act creating county councils had not then passed, and the draughtsman, fearing that it might be modified in the course of its passage, thought it more prudent to wait until it had passed and then deal in the Act itself with the repetition of voters' names on the lists so far as they affected the administrative franchise. And accordingly by s. 75 of the Local Government Act, Part III. of the Municipal Corporation Act, 1882, is incorporated, by s. 44 of

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which the burgess lists are to be revised in accordance with the provisions of the Registration Act, 1878. Reading, then, "county register" for "burgess list," the note system of the Act of 1878 is made applicable to the county register for the purposes of the election of county councillors. If this were not so, then if a voter's name appeared a dozen times in the same division register (which might well happen if he owned land in a dozen parishes in the division, the lists being in the first instance made out by the parochial officers) there would be no means of neutralising the repeated entries, and if the other side's contention is right, the voter would have a right to vote twelve times for the same division. But this can never have been intended.

The proviso at the end of sub-s. (5) of s. 7 of the County Electors Act, that the voter "shall have the same right of voting at an election of a county authority as he would have if no such mark were placed against his name," does not define what that right is. It is a purely negative provision, and does not expressly confer a right of voting for different electoral divisions in the same county.

Finlay, Q.C., in reply.

Cur. adv. vult.

1889. Dec. 18. The judgment of the Court (Lord Coleridge, C.J., and Mathew, J.) was delivered by

MATHEW, J. This was an action brought to try the question whether the plaintiff was entitled to vote at the same election in two electoral divisions of the administrative county of London.

The plaintiff's vote had been refused by the defendant as presiding officer for the City division on the ground that the plaintiff had already voted in the Greenwich electoral division, and the plaintiff sued the defendant in the City of London Court to recover damages for rejecting the plaintiff's vote.

The case raised the question whether in elections for county councils an elector having a qualification in more than one division can vote in each of such divisions, or can vote only once.

It was admitted that the plaintiff was a duly registered elector for the City and for the Greenwich electoral division, that he had

voted in the latter division before he demanded a voting-paper and proposed to vote in the City, and that his vote had been on that ground rejected by the defendant in the City electoral division.

The case came on for trial before the judge of the City of London Court, who gave judgment for the defendant, and against this judgment the plaintiff appealed.

The argument for the plaintiff may be stated thus. The Local Government Act, 1888, s. 2, sub-s. (4), provides that as respects the election of county councillors the persons entitled to vote (elsewhere than in a borough) shall be the persons registered as county electors under the County Electors Act, 1888. The plaintiff was admitted to be entitled to be placed on the roll of electors for both divisions under s. 7, sub-s. (1), of that Act. By sub-s. (4) of s. 7 nothing in that section is to prevent a county elector from being registered in more than one division register. And by sub-s. (5), which is intended to secure that a parliamentary voter shall not vote at an election more than once in respect of different qualifications in the same parliamentary division, it is provided that the voter shall have the same right of voting at an election of a county authority as if the section did not apply. The case was therefore said to be perfectly clear when the Local Government Act and the County Electors Act were read together, and the argument that under s. 75 of the Local Government Act, 1888, statutes were incorporated which might lead to a different conclusion, was met by reference to the express terms of that section, that no enactment is to be incorporated inconsistent with the provisions of the Local Government Act.

On the other hand the defendant's counsel contended that the County Electors Act, when carefully examined, disclosed no intention that the elector for the county council was to be entitled to vote in each electoral division, as he clearly would have been if he were duly qualified as a voter in different parliamentary divisions. Sect. 7, sub-s. (5), it was said, applied to parliamentary electors only, and the clause at the end of the section which preserved any right of voting at an election of a county authority did not define or specify what that right was. The object of sub-s. (5) it was urged was not to confer a double franchise on

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county council electors, but was to prevent the loss of a vote at an election for the county authority, as would be the result if, instead of an asterisk, there was an erasure of the voter's name, in accordance with the Registration Act, 1885, s. 4, sub-s. (9) (*a*). It was pointed out that by s. 7 of the County Electors Act, 1888, sub-s. (2), the Registration of Electors Acts, and ss. 45, 48, and 71 of the Municipal Corporations Act, 1882, are to apply for the purposes of the section, with the substitution of county register and division register for burgess roll and ward roll respectively, and of electoral division for ward. Then by s. 75 of the Local Government Act, 1888, portions of the Municipal Corporations Act are incorporated, and among them is the 51st section, which provides that no person shall vote in more than one ward; and by the Local Government Act, 1888, s. 2, it is provided that the council of a county and the members thereof shall be constituted and elected in like manner and in like position in all respects as the council of a borough divided into wards, but subject to the provision (sub-s. (2) (*e*)) that the divisions shall be called electoral divisions and not wards. This provision, it was said, was the key to the true construction of the statute, and shewed a clear intention that, under s. 75, s. 51, sub-s. (2), and s. 59 of the Municipal Corporations Act, 1882, should be incorporated with the Local Government Act.

If any provision of the County Electors Act was inconsistent it was pointed out that it was repealed by s. 126.

It followed that the right of voting in divisions in administrative counties was to be dealt with as in wards in municipal elections, for which only one vote is allowed.

We are of opinion that the argument for the defendant must prevail, and that the judgment for the defendant must be affirmed. We cannot adopt the view that the clauses of the Municipal Corporations Act are inconsistent with the provisions of the principal Act with which they are incorporated. Those sections seem to us in harmony with s. 2 of the statute.

We were much pressed with the argument for the plaintiff that the right to vote must follow the express provision of the County Electors Act, that the plaintiff was entitled to have his name placed on the list of voters for each electoral division.

It was insisted that the only object of being registered is to secure a right to vote; and that, if the right was once conferred, it was unreasonable to suppose that the legislature would forthwith enact that the right should be taken away. It was said to be almost disrespectful to the legislature to suppose that in Acts of Parliament passed in the same session, and apparently intended to be read together, there could be found one set of provisions that gave and another that took away the right of the elector to vote in different divisions.

But the argument rests upon what appears to us to be the erroneous view that the County Electors Act and the Local Government Act are to be treated as if they were one statute.

The County Electors Act came into operation some months before the Local Government Act, and at a time when the exact form which the later Act was to take had not been decided on. We consider that the intention of the legislature must be sought from the later Act, and that it is impossible to give effect to its various provisions on this subject without holding that for the purpose of voting the electoral division of the administrative county is to be regarded as if it were a ward in a borough.

It follows that the voter has only one vote at an election for an administrative county council. The judgment of the Court below must therefore be affirmed with costs.

We have arrived at this conclusion with some difficulty, though without doubt. The difficulty has arisen not from anything inherent in the subject itself, which is simple enough, and might be quite simply treated, but from the mode of legislation now usual in these matters. Sometimes whole Acts of Parliament, sometimes groups of clauses of Acts of Parliament, entirely or partially, sometimes portions of clauses are incorporated into later Acts, so that the interpreter has to keep under his eye, or, if he can, bear in his mind, large masses of bygone and not always consistent legislation in order to gather the meaning of recent legislation. There is very often the further provision that these earlier statutes are incorporated only so far as they are not inconsistent with the statute into which they are incorporated; so that you have first to ascertain the meaning of a statute by reference to other statutes, and then to ascertain whether the

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earlier Acts qualify only or absolutely contradict the later ones, a task sometimes of great difficulty, always of great labour—a difficulty and labour generally speaking wholly unnecessary. It has, indeed, been suggested that to legislate in this fashion, keeping Parliament in truth in ignorance of what it is about, is the only way in which at the present day legislation is possible. We know not whether the suggestion is correct; what we do know is that this procedure makes the interpretation of modern Acts of Parliament a very difficult, and sometimes doubtful, matter. We, the judges, have perhaps the least cause to complain. We sit here for the purpose, among other things, of interpreting Acts of Parliament, and we bring, or ought to bring, to our task trained and experienced intellects. But in practical matters of every day concern, such as the possession and exercise of the franchise, it is of the last importance that the law conferring it, and the rules which govern its exercise, should be easily comprehensible by the mass of the ordinary voters. We are well aware that protest as to past legislation is unavailing, but for the future to draw attention to a plain evil may perhaps be the first step towards its remedy.

Appeal dismissed.

Solicitor for plaintiff: *The City Solicitor.*
Solicitors for defendant: *Lowless & Co.*

J. F. C.

[IN THE COURT OF APPEAL.]

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Nov. 25.

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF BURTON-UPON-TRENT, APPELLANTS; THE ASSESSMENT COMMITTEE OF THE BURTON-UPON-TRENT UNION AND THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE TOWNSHIP OF STRETTON, RESPONDENTS.

THE SAME, APPELLANTS; THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE PARISH OF EGGINTON AND THE ASSESSMENT COMMITTEE OF THE BURTON-UPON-TRENT UNION, RESPONDENTS.

Poor-rate—Rateable Value—Sewage Farm—Beneficial Occupation—Possible Tenant—Occupation by Owner.

The appellants, under powers given them by statute, purchased, for the purpose of disposing of the sewage of Burton-upon-Trent, land for a sewage farm, and also land on which they erected a pumping-station, with all necessary engines and machinery to pump the sewage on to the farm. On appeals against assessments on the sewage farm and pumping station, cases were stated, in which it was found that it was impossible to work the farm except at a loss so long as it remained a sewage farm, and that if the appellants desired to let it as a sewage farm they would be unable to find any one to take it, even at a nominal rent, and that the pumping station, while used as part of the sewage system, was incapable of yielding a profit, but that if the sewage-farm and pumping-station belonged to a private owner the appellants would hire them at a yearly rent sufficiently high to support the rate:—

Held (reversing the judgment of the Queen's Bench Division), on the authority of *Reg.* v. *School Board for London* (17 Q. B. D. 738), that in making the assessment the appellants ought to be considered as possible tenants, and that therefore the assessment was right.

THESE were two cases stated on appeals to the quarter sessions for the county of Stafford.

The following case was stated in the first of the appeals:—

1. The appeal is against a poor-rate for the township of Stretton in which the appellants' land and sewage pumping-station were rated at 1050*l.* gross estimated rental and 840*l.* rateable value.

2. The land and sewage pumping-station, the subject of this appeal, form part of the lands and works acquired and erected by the appellants for the disposal of sewage under the powers and provisions of the Burton-upon-Trent Corporation Act, 1880, 43 & 44 Vict. c. cxxxix. (local).

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3. For the purpose of dealing with and disposing of the sewage of Burton-upon-Trent it is necessary to have a pumping-station with all necessary engines and machinery to pump the sewage on to a farm at some distance from the town. The farm is situate in the parish of Egginton in the county of Derby.

4. The system adopted is as follows:—The sewage is conducted by gravitation down a falling main from the town of Burton-upon-Trent to the pumping-station. When it arrives there it is passed through screening chambers for the purpose of eliminating corks, rags, ashes, &c., and thence into reservoirs under the boiler house and outside each engine-house and from those reservoirs it is pumped up through a rising main on to the sewage farm.

5. All the machinery, buildings, and works at the pumping-station were specially designed and made for the work which they have to do, and cannot be used beneficially for any other purpose, and it has been necessary to erect an embankment all round the land on which the buildings stand so as to guard against floods and to make higher foundations in the engine-house to keep the machinery above flood level. The whole of the falling main and a length of about 840 yards of the rising main is in the parish of Stretton.

6. The mains, land, and pumping-station were and are suitable and necessary to enable the appellants to dispose of the sewage on their sewage farm and all the works have been constructed and carried out efficiently and economically for the object in view, but they would be of no substantial value to any one except to the appellants and for the above object.

7. It is impossible to work the sewage farm except at a loss, and the land and pumping-station while used as part of the sewage system are incapable of yielding a profit or advantage, except that they enable the appellants to convey the sewage on to the farm, but the appellants would not be able to carry out their statutory duties as to the disposal of sewage at any other place at a smaller expense. If the land and pumping-station in question belonged to a private owner he would let, and the appellants would hire them at a yearly rent sufficiently high to support the present rate.

8. It is agreed and found as a fact that except to be used for

the purposes of the Burton-upon-Trent sewage system the value of the land and premises in the parish of Stretton would not be more than 100*l.* gross estimated rental and 75*l.* rateable value.

9. The appellants contend that the pumping-station and premises being only capable of beneficial occupation if used for other than sewage purposes, should be rated at the value for which the same would let to a hypothetical tenant from year to year supposing they were not used as part of the sewage system, but were entirely disconnected therefrom and applied to such useful purposes as they might be made available for, and that the rateable value should be reduced accordingly.

10. The respondents contend that it is not necessary to rateability that the premises as actually occupied and utilised should yield or be capable of yielding a commercial profit; it is sufficient if they could be let and would command a rent from any possible hypothetical yearly tenant, and that the appellant corporation ought to be taken into account as one of the possible hypothetical yearly tenants, and that the present rate is right.

The following was the case stated in the second of the appeals:—

1. The appeal is against a poor-rate for the parish of Egginton in which the appellants' sewage farm was rated at 2000*l.* gross estimated rental and 1800*l.* rateable value.

2. The sewage farm in the parish of Egginton consists of about 310 acres of land; it has been acquired and is laid out and worked by the appellants under the provisions of the Burton-upon-Trent Corporation Act, 1880, and the sewage is delivered on to the farm through a rising main, 4370 yards whereof is in the parish of Egginton from a pumping station of the appellants situate in the parish of Stretton.

3. After the sewage has passed through the land the effluent passes away through a falling main into the river Trent.

4. Large sums of money were necessarily spent by the appellants in levelling the surface of the farm and trenching the land, in clearing away fences, making roads, straightening watercourses, and in doing what was necessary to enable the sewage to be put upon the land, and an elaborate system of subsoil drainage was adopted. This system of drainage is necessarily

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on a much larger scale than would be necessary on an ordinary farm. The sewage itself contains about three times as much matter in suspension as ordinary sewage, and so causes increased expense on the farm in preventing the carriers and gutters from becoming choked, and it is also of low manurial value.

5. The rising main traverses the farm to its highest point, and by means of branches, pipes, and carriers can be delivered on to any plot on the farm.

6. It is impossible to work the sewage farm except at a loss as long as it remains a sewage farm, and if the appellants desired to let it as a sewage farm they would be unable to find anyone to take it, even at a nominal rent, but if disconnected from the sewage system of which it forms a part it might be let to a tenant for ordinary agricultural purposes at the same rent per acre as similar land in the neighbourhood, which would represent 400*l.* gross estimated rental and 310*l.* rateable value. The appellants are content that it should be assessed and rated at those amounts.

7. The sewage farm has been and is laid out and worked suitably and economically by the appellants for the disposal of the sewage, and they would not be able to carry out their statutory duties at any smaller expense or more conveniently elsewhere. If the sewage farm with its present appliances belonged to a private owner he would let and the appellants would hire it, as a sewage farm, at a yearly rent sufficiently high to support the present rate.

8. The appellants contend that the sewage farm, being incapable of beneficial occupation in its present condition, is not rateable, or that if rateable it should be rated at the value for which the same would let to a hypothetical tenant from year to year supposing it were not used as part of the sewage system, bnt were entirely disconnected therefrom and used for ordinary agricultural purposes, and that the rate should be reduced accordingly.

9. The respondents contend that it is not necessary to rateability that the premises as actually occupied and utilised should yield or be capable of yielding a commercial profit, it is sufficient if they could be let and would command a rent from any possible

hypothetical yearly tenant, and that the appellant corporation ought to be taken into account as one of the possible hypothetical yearly tenants, and that the present rate is right.

1889. June 24. *Bosanquet, Q.C.* (*J. H. Etherington Smith*, with him), for the appellants. The farm, while part of the sewage system, is incapable of beneficial occupation. If disconnected it could be let as an ordinary farm; and the appellants are content that it should be rated at its agricultural value. The appellants have no beneficial occupation, and are not rateable: *Rex* v. *Sculcoates*. (1) Although the pumping-station might, if taken separately, be rateable at what it would let for to a tenant from year to year, the land occupied by the sewers or carriers is not rateable: *Metropolitan Board of Works* v. *West Ham* (2); *Reg.* v. *Metropolitan Board of Works*. (3)

The respondents rely on *Reg.* v. *School Board for London* (4) In that case it was held that the school board itself ought to be considered as a possible tenant in assessing their schools to the poor-rate, although they made no commercial profit as tenants, and that the gross and rateable values should be calculated by the rent which the board might reasonably be expected to pay for the premises for use as schools. But the distinction is that schooling is an ordinary business carried on for profit. The premises were in no sense "struck with sterility." That case is explained and distinguished in *Owens College* v. *Overseers of Chorlton-upon-Medlock* (5); but neither case affects the principle that is applicable to land used at a loss for a sewage farm.

Meadows White, Q.C. (*Fullarton*, with him), for the respondents. The corporation must provide for the disposal of sewage. They choose to buy land and prepare it for the purpose. There is no restriction on them, as in *Owens College* v. *Overseers of Chorlton-upon-Medlock*. (5) The land is not struck with sterility. There is produce, but the cost of labour at the sewers overbalances the value of the produce. There may be no commercial profit, but there is a beneficial occupation, because the corporation are

(1) 12 East, 40.
(2) Law Rep. 6 Q. B. 193.
(3) Law Rep. 4 Q. B. 15.
(4) 17 Q. B. D. 738.
(5) 18 Q. B. D. 403.

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enabled by means of the land to discharge their duty the better, and therefore the occupation is a benefit to them. The only case at all in favour of the appellants is *Metropolitan Board of Works* v. *West Ham* (1); that was cited in *Reg.* v. *School Board for London* (2), yet the Court held that the school board was to be regarded as a possible tenant who would take the premises from year to year. In *Owens College* v. *Overseers of Chorlton-upon-Medlock* (3) it appeared by necessary implication from the Acts regulating the college that the trustees could not become tenants, and therefore they were held to be excluded from the class of hypothetical tenants, but the corporation of Burton being possible tenants and allowed to rent land are not to be excluded. By the Burton-upon-Trent Corporation Act, 1880, the corporation may make agreements with any person with respect to any matter within the Act in relation to sewage. They have also similar powers under the Public Health Act, 1875 (38 & 39 Vict. c. 55).

Bosanquet, Q.C. (who was only called on to reply as to the rating of the pumping-station), for the appellants. If detached from the sewage system the pumping-station could be let at 100*l.* a year, and the rateable value would be 75*l.*, on which the appellants would be content to be assessed, but until it is cut off it is part of a system by which the corporation perform an onerous duty at a loss.

The distinction is drawn by all the judges in *Metropolitan Board of Works* v. *West Ham.* (1) Further, the land has been bought by the appellants under their Act, and even assuming that they could have put in force other powers under the Public Health Act, 1875, they are owners and cannot become tenants.

LORD COLERIDGE, C.J. These cases have been properly argued together, because they really form two portions of one and the the same subject-matter of argument, although somewhat different principles apply to the two cases.

The corporation of Burton are bound by Act of Parliament to dispose of the sewage of Burton, and they have powers under the Act, if they think fit, to dispose of it through the instrumentality

(1) Law Rep. 6 Q. B. 193. (2) 17 Q. B. D. 738.
(3) 18 Q. B. D. 403.

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of a sewage farm. They have chosen that instrumentality and have disposed and are disposing of the sewage by means of this sewage farm. The sewage farm is physically divisible, as these cases are divisible, into two subjects; there is the pumping-engine and station and works connected therewith, which lift the sewage to a level so that it will run to the sewage farm, and the farm on which that sewage is expended, purified and dealt with as it is proper to deal with it. Those two things not only may be but are divided by a considerable distance, apparently about two miles.

I will take the last case first, because it seems to me that the considerations applying to it are few and simple, and that so far as we are concerned our judgment may proceed upon a very short and distinct ground. The argument on the part of the corporation is that the pumping-station ought not to be treated as severed from the sewage farm, and that, the whole being part of one system, and the whole system being a loss to the corporation, no part of that system can be rateable. I do not agree, because, you are not to look at the mode in which as a matter of fact at a particular moment the whole system is occupied by the corporation, but to see if, by splitting up the subject-matter into more than one holding or tenement, there remains a possibility of fulfilling the conditions of the Parochial Assessment Act as to one or more portions of the whole system, and finding a tenant from year to year, subject to the conditions of the Parochial Assessment Act, to give something for it, and if you can find a tenant who will give something for it as a tenant from year to year, then what he would give is the measure of the rateability of that portion of the system. It is not the less so because the corporation of Burton choose for their own convenience to occupy the whole together—both that part which I will assume for the purpose of this argument they could not let to any possible tenant from year to year, and what they could let to a possible tenant from year to year. The subjects are divisible; the conditions are different; and it may well be, and in my judgment is, that in respect of one they are rateable and in respect of the other they are not. Then how are they rateable? It seems to me that that has been decided by authority which

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it is not for us to overrule. If the case of the *Metropolitan Board of Works* v. *West Ham* (1) has been in the opinion of the Court of Appeal wrongly decided, the Court of Appeal must overrule it. We, however, must treat it as an authority directly in point.

For my own part I think the case very properly decided, and if the matter were res integra I should hold the same as the Court of Queen's Bench held in that case. It seems to me that there really is no difference between the portion of the drainage works which was held rateable in that case and the portion of the corporation of Burton's works which we hold rateable in this case. But then, as I said before, upon what is it rateable? The Queen's Bench said in that case it was rateable upon such a sum as a tenant from year to year would give if he took that part of the entire system by itself, and applied it to such useful purposes as it might be fit for.

That being the principle, here the figures are found for us. It is found that if the corporation severed it and the pumping-station were in the market, a tenant from year to year could be found to make use of the station and the engine and so forth, not of course for the purposes for which it is now used, which makes it in a certain sense very much more valuable, but it would have some value, and that value is found to be 75*l.* a year. Upon that part of the case we think that the appellants must partially succeed; that is, the appellants must be rated, but must be rated to the extent that the arbitrator has found to be the value, upon the principle of the *Metropolitan Board of Works* v. *West Ham.* (1)

That brings me to the second part of the case, which is really the first that was argued, but which I have taken last, because it is rather more difficult. The facts, as I understand, found in the case are these. Here is a sewage farm of considerable extent, occupied by the corporation of Burton-upon-Trent for the purposes of getting rid of the sewage, and it is found that this land which they have purchased under the powers of their Act, and which they use for a particular purpose, is, in their hands, not only profitless, but not even beneficial, because in order to

(1) Law Rep. 6 Q. B. 193.

get the proceeds they must expend a much larger sum than what they get back. Therefore they occupy at a loss. There is neither profit nor benefit to them. I quite admit the distinction engraven in the law now for a long time between profitable occupation and beneficial occupation; I accept it, understand it, and desire to act upon it. Here it seems to me the case is like that of an ordinary farm, which, from the circumstances of the occupation, has ceased to be a farm which any tenant from year to year would take. As long as that is so there is nothing to rate, because either there is no occupation in point of fact, or the farm can only be cultivated at a nominal rent, or at some rent which leaves no profit and no benefit to the person who is occupying it. Under those circumstances there is no subject matter of rateability, because there is no occupation which is beneficial to anybody.

In the case to which I have had more than once occasion to refer, that of the North Devon Railway, when it was just struggling into existence, the expenses of the railway were a great deal more than the profits, and nobody would have been found to take—not merely the portion which was in the particular parish in which the dispute arose, but—the railway in its integrity, as a tenant from year to year, because in order to get the small amount which he could have got by the occupation of the railway, he would have had to spend a great deal more than he got back. Therefore, so long as that state of things continued, there was nothing to rate. That state of things passed away, and the railway is rateable now at what, in each particular parish, according to the well-known principles of railway rating, tenants would be willing to give for that portion of the railway which is the subject-matter of rates. So here, if the law should be altered and if the corporation should be able—not only to let, but—to sell and be able to sell without the burdensome incidents which are now attached to the occupation, of course the rateability of the farm will at once come into existence again. But so long as it remains as it is at present it seems to me to be within the principle of those cases which decide that where there is no profit and no benefit to anybody, rebus sic stantibus the land is not rateable. I think that the sections to which we have

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been referred are important in a certain sense as shewing what is the nature of the occupation and as shewing that it is not inherent in the nature of the case that there should not be a rateability. The corporation can only, as I understand, under any of their powers let so much of the farm as will leave enough of it in their hands to conduct the system which they are bound by Act of Parliament to conduct, of getting rid of the sewage. It seems to me that the distinction which has been drawn between this case and the School Board case is a sound one. Here the corporation of Burton have a right to do what they have done; they are empowered to do it; they have a duty cast upon them, but the particular means of discharging that duty is left to their own discretion; they choose a particular means which they have a right to choose, and in following out the means which they have chosen they incur loss instead of profit, and the occupation which they had therefore is not, in their hands, either profitable or beneficial. But in the school board case not only was the school board bound to perform a duty by having a particular set of buildings, but was bound to perform the duty in the particular way in which they did perform it; I mean they could not raise a fund and buy a site for a school outside their limits; they were bound to get school buildings within particular limits for the purpose of carrying on their school in those buildings, and the moment that they became possessed of those buildings, either as tenants or as owners, they could not use those buildings in any other way than that directed by the Act of Parliament. But inasmuch as they were bound to find some buildings, and inasmuch as the duty cast upon them left them only the option of occupying this house or that house, these premises or those premises, and as it must have cost them something either to build or to rent, and as they acquired the premises in the fulfilment of a statutory duty, the Court, as I understand, held that they had a beneficial occupation because the occupation of that particular place was in truth an occupation under the Act of Parliament, and in holding it they discharged, and were therefore relieved from, the parliamentary responsibility put upon them. That does not exist in the present case; there is no parliamentary responsibility put upon the corporation to hold this particular

farm; they are not bound to buy or to rent this particular farm. They may do it; they have done so; they are like any other tenants. They are just in the same condition—neither better nor worse than any other tenants; and at this moment there is no beneficial occupation—there is nothing to rate. Therefore the appellants on this part of the case are entitled to our judgment.

STEPHEN, J. I am entirely of the same opinion, and for the same reasons.

Judgment for the appellants.

J. R.

The respondents in each case appealed.

1889. Nov. 25. *Fullarton* (*Sir R. Webster, A.G.*, with him), in support of the appeals. The moment it is ascertained that the hereditament is of a rateable character the test of value to be applied is that laid down by the Parochial Assessment Act of 1836, that the rate is to be made on an estimate of the rent at which the hereditament might reasonably be expected to let from year to year free of the enumerated charges. All the hereditaments in this case are capable of beneficial occupation, so that the only ground that was given for the exemption of the sewers in *Reg.* v. *Metropolitan Board of Works* (1) does not apply. In considering at what rent the premises might reasonably be expected to let the corporation must be taken into account as possible hypothetical tenants: *Reg.* v. *School Board for London* (2); *Owens College* v. *Overseers of Chorlton-upon-Medlock.* (3) In the latter case the ground of exemption was that the trustees of the college, by reason of statutory provisions, were prevented from renting the premises, and so must be excluded from consideration as possible tenants. The appellants in this case are under no such restriction.

Bosanquet, Q.C. (*J. H. Etherington Smith*, with him), contrà. The finding in the case that if the land and pumping-station belonged to a private owner the appellants would hire them at a rent sufficiently high to support the rate is an hypothesis which

(1) Law Rep. 4 Q. B. 15. (2) 17 Q. B. D. 738.
(3) 18 Q. B. D. 403.

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should not be taken into account as the appellants are themselves owners of the land. The proper way to arrive at the rateable value is to assume that the works are disconnected and the land rated at its agricultural value. Such a rate the appellants are willing to pay. The essence of the cases of *Reg.* v. *Metropolitan Board of Works* (1) and *Metropolitan Board of Works* v. *West Ham* (2) is that till the unremunerative use is disconnected from the hereditament it can be worth nothing for rateable purposes, but that you can treat it as disconnected and ascertain what the value would be if the premises were applied to some purpose for which they could be made available in the hands of a tenant. The land in this case can be treated as disconnected from the whole drainage system, and in that condition a tenant could be found for it. The drainage system is a benefit to the town of Burton-upon-Trent, where the houses are benefited and the rates higher in consequence, but of no benefit whatever to the parishes in which it lies, and the unprofitable works are not to be rated higher in the hands of the corporation because of the benefit derived elsewhere. This land in the hands of the corporation is used for a public purpose, and they are under restrictions as to its profitable use, as in *Corporation of Worcester* v. *Droitwich Assessment Committee* (3) and *Mersey Docks and Harbour Board* v. *Overseers of Llaneilian.* (4) In *Reg.* v. *School Board for London* (5) it is not suggested that the previous cases on which the appellants rely are overruled. In that case there was a thing which might have been let as it stood, and the user of which was in itself of a profitable nature, while the sewage farm and works must make a loss so long as they are used for that purpose. *Owens College* v. *Chorlton-upon-Medlock* (6) shews that where there is no power in the occupier to become tenant he cannot be taken as an hypothetical tenant. Bowen, L.J., went further and based his judgment on the fact that the trustees having purchased could neither sell nor let but must continue to occupy the premises for the statutory purposes. An exemption based on that ground would be applicable in the present case. [He then argued that by the

(1) Law Rep. 4 Q. B. 15.
(2) Law Rep. 6 Q. B. 193.
(3) 2 Ex. D. 49.
(4) 14 Q. B. D. 770.
(5) 17 Q. B. D. 738.
(6) 18 Q. B. D. 403.

Burton-upon-Trent Act the corporation had no power to rent land for the purposes of a sewage farm.]

Sir R. Webster, A.G., in reply. In addition to the statutory power to purchase lands under their Act the corporation can exercise the powers given to rent land by the Public Health Act, 1875, s. 27. The cases of *Reg.* v. *Metropolitan Board of Works* (1) and *Metropolitan Board of Works* v. *West Ham* (2) were decided on the specific facts stated and questions raised. The statements in the present cases shew conclusively that the corporation would become tenants if they were not owners, and *Reg.* v. *School Board for London* (3) shews that they can be taken into account as hypothetical tenants. [He referred to *Guest* v. *East Dean.* (4)]

LORD ESHER, M.R. I am of opinion that the decisions in these rating cases have been progressive, and that in the earlier cases points which might have been raised and decided were not raised, points which have been raised and dealt with in later cases. The Courts, as I imagine, saw the difficulties, and when they had cases before them which put certain questions to be answered, they did not consider any others. Putting that gloss on the earlier cases it is of no use to say that the same questions might have arisen in them as are now raised because the Courts did not consider them, and it cannot be said that they were decided when they were not considered. Now the question of whether the occupying tenant could be taken into consideration as a possible hypothetical tenant was never raised for decision till *Reg.* v. *School Board for London.* (3) It is said the point might have been raised for decision in *Metropolitan Board of Works* v. *West Ham* (2), but even if it had been put before the Court, there was this peculiarity in the case that it had been left to the Court to draw inferences of fact, and the Court, by the inference they drew, shut themselves out from deciding the point, because the inference they drew was that the sewer was incapable of beneficial occupation. That is a finding which is contrary to what is found in this case. In the case of *Mersey Dock and Harbour Board* v. *Overseers of Llaneilian* (5) the point was not

(1) Law Rep. 4 Q. B. 15.
(2) Law Rep. 6 Q. B. 193.
(3) 17 Q. B. D. 738.
(4) Law Rep. 7 Q. B. 334.
(5) 14 Q. B. D. 770.

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even glanced at, so that decision affords no authority in the present case. The point we are considering was first raised and considered by the Court in *Reg.* v. *School Board for London.* (1) It was pointed out that the question under the statute is not whether a tenant could occupy at a profit, but whether a tenant could be found willing to pay a rent. You cannot have as hypothetical tenant some one who cannot be a tenant at all, but if you can find any one who would give rent for the subject-matter used as it is used that person must be treated as an hypothetical tenant, whether he would have a profitable or merely a beneficial holding. Applying this to the particular case we said that if an owner in occupation of premises is a person who but for being owner could be a tenant and would pay a rent he must not be excluded from consideration as a possible tenant. The point was subsequently raised in *Owens College* v. *Overseers of Chorlton-upon-Medlock.* (2) It had been foreseen and guarded against that if ever you got an owner in possession who could not be a tenant he could not be taken into account as an hypothetical tenant, and on that ground it was decided that the college should not be taken into consideration, though but for the disability to be tenant the college would rightly have been taken into consideration in seeing what possible tenants could be found. It was said that in the judgment of Bowen, L.J., in the Law Reports, there were phrases which shewed that he was taking a different view from the other members of the Court. I cannot see from the report that that is so, but taking the judgment as reported in the Law Journal Reports (3) I defy any one to point out any such difference.

In this case the corporation have to carry out certain duties and to dispose of their sewage. If they had not been owners of it they might have rented this very sewage farm. Is not that within the decision of the School Board case? There is no room here for drawing inferences of fact, for there is an express finding which, unless it can be shewn to be contrary to the Act under which the corporation is proceeding, established that they would have given a rent for the subject-matter of these rates which

(1) 17 Q. B. D. 738. (2) 18 Q. B. D. 403.
(3) 56 L. J. (M.C.) 29.

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would support the assessment. I see no reason to alter the opinion I expressed in the School Board case, and I cannot draw the distinction between that case and the present which the Court below has drawn. I am therefore of opinion that, apart from figures, as to which no question is raised, the rating is correct in principle and ought to stand, and that the appeals should be allowed.

LINDLEY, L.J. The question we have to decide turns on the construction of the Parochial Assessment Act of 1836, s. 1 of which declares that no rate for the relief of the poor is to be allowed which is not made upon an estimate of the net annual value of the several hereditaments rated thereto, that is to say, of the rent at which the same might reasonably be expected to let from year to year free of certain deductions to which I need not refer. We have to apply that provision to the facts stated in these cases. The question is of importance—whether an occupier who is also owner of the premises to be rated is such a tenant as is contemplated by the Act. It has, however, arisen before and was solved in the case of *Reg.* v. *School Board for London.* (1) In that case it was decided that although you could find no other possible tenant than such a one as I have described, still there was nothing in his position to prevent his being treated as an hypothetical tenant. I do not think that particular point was ever raised in the previous cases, certainly in none of them was there a finding such as that in par. 7 of the first of these cases. That appears to me to be decisive of this case by bringing it within the decision in the School Board case. *Owens College* v. *Overseers of Chorton-upon-Medlock* (2) would have been decided the same way but for one circumstance, that the college could not under any circumstances be tenants. I can see no difference in principle between the cases of the sewage farm and the pumping-station, and I think therefore these appeals should be allowed.

LOPES, L.J. According to my view this case is governed by *Reg.* v. *School Board for London* (1), and *Owens College* v. *Overseers of Chorlton-upon-Medlock* (2), and on the authority of those

(1) 17 Q. B. D. 738. (2) 18 Q. B. D. 403.

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two cases the corporation must be taken into consideration as a possible hypothetical tenant. If so, then having regard to the finding in the cases as to what the corporation would be willing to pay as rent they are rightly assessed at the higher rate. At the same time I must say that I have a difficulty in reconciling the cases of *Reg.* v. *School Board for London* (1) and *Metropolitan Board of Works* v. *West Ham.* (2) But however that may be, if the cases are inconsistent the effect would be that the earlier case is overruled. Speaking for myself, if the point had not been decided by those two cases I should have doubted whether an occupier under statutory restrictions who suffers a loss by his occupation of a rateable hereditament is the kind of hypothetical tenant contemplated by the statute. I should have thought that the statute contemplated an ordinary tenant, and not one forced by the circumstances of the case to become occupier at a loss. We are, however, bound by these decisions, and the assessment must be supported. The same considerations seem to me to apply to the farm and to the pumping-station, and I think the Court below must have overlooked the finding in par. 7 of the Stretton case.

Appeals allowed.

Solicitors for appellants: *Geare, Son & Pease, for Drewrys, Burton-upon-Trent.*

Solicitors for respondents: *J. & C. Robinson & Wilkins, for Henry Goodger, Burton-upon-Trent.*

(1) 17 Q. B. D. 738. (2) Law Rep. 6 Q. B. 193.

A. M.

[IN THE COURT OF APPEAL.]

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Dec. 12, 13, 14, 15, 17.

THE QUEEN *v.* THE BISHOP OF LONDON.

Ecclesiastical Law—Public Worship Regulation Act, 1874 (37 & 38 *Vict. c.* 85), *s.* 9—*Bishop's Discretion to stop Proceedings on Representation—"After considering the whole circumstances of the case"—Refusal or Excess of Jurisdiction—Mandamus.*

By s. 9 of the Public Worship Regulation Act, 1874, it is provided, where a representation has, under s. 8, been sent to the bishop of the diocese complaining of an unlawful alteration in or addition to the fabric, ornaments, or furniture of a cathedral church, that he shall take certain specified steps to have the matter of the complaint tried in one of the ways prescribed by the Act, "unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, in which case he shall state in writing the reason for his opinion, &c."

A representation was sent to the Bishop of London complaining that the Dean and Chapter of St. Paul's Cathedral Church had set up on a reredos in that church a figure, five feet in height, of our Lord upon the Cross, in a conspicuous position immediately above the communion table, so as to have the appearance of an altar crucifix; and a figure, five feet six inches in height, of the Virgin with the Child in her arms, in a conspicuous position above the figure of our Lord; and that each of such figures tended to encourage ideas and devotions of an unauthorized and superstitious kind, and was unlawful. The bishop replied that, having in pursuance of the statute considered the whole circumstances attending the representation, he was of opinion that proceedings should not be taken; stating in substance as his reasons that the main question of principle at issue had been already decided in *Phillpotts* v. *Boyd* (Law Rep. 6 P. C. 435), in which a reredos, shewing a figure of our Lord in the act of ascending into heaven, in a conspicuous position immediately above the communion table, was held to be lawful; that it appeared impossible to say that the difference between the two erections was of very grave importance, or that one offered serious temptations to idolatry and the other did not: that litigation in such matters, even where necessary in order to settle disputed matters of grave importance, was a necessary evil, keeping up irritation and party strife, embittering men's feelings, inflicting much mischief on the Church and true religion, and only tolerable as a preventive of worse mischief which would otherwise follow; and he was satisfied that, in the present instance, the proceedings could not end in any result which would make up to the Church and to the religious life of the country for the mischief which would be inflicted upon them by the litigation itself.

On an application by the complainants for a mandamus to compel the bishop to act in furtherance of the proceedings as prescribed by the statute:—

Held (reversing the judgment of the Queen's Bench Division), that it did not appear that the bishop had either declined the jurisdiction given him by the

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Act by refusing to consider the circumstances of the case, or exceeded such jurisdiction by considering matters which were not circumstances of the case, and therefore no grounds were shewn for issuing a mandamus.

APPEAL from the order of the Queen's Bench Division making absolute a rule for a mandamus (1).

The facts were in substance as follows:—The prosecutors, being persons qualified so to do under the Public Worship Regulation Act, 1874, duly made a representation in writing to the bishop stating:

(1.) That the dean and chapter of the cathedral church of St. Paul in the city of London within five years before the date hereof, that is to say in the month of January, 1888, have introduced into the said cathedral church, and set up upon the altar-piece or reredos therein, an image or sculptured subject, representing our Lord upon the Cross, in a conspicuous position immediately above the communion table, the figure of our Lord being of the height of five feet or thereabouts.

(2.) That the said image or sculptured subject is so constructed as to have the appearance of such an altar crucifix as was used in the Church of England immediately before the Reformation, and so as to answer the purposes for which such a crucifix was intended.

(3.) That the said dean and chapter, within five years before the date hereof, that is to say, in the month of January, 1888, have introduced into the said cathedral church, and set up upon the said altar-piece or reredos therein, an image or sculptured subject, representing the Blessed Virgin Mary with the Child in her arms, in a conspicuous position a few feet above the first herein-mentioned image or sculptured subject, the figure of the Blessed Virgin being of the height of five feet six inches, or thereabouts.

(4.) That each of the said images or sculptured subjects tends to encourage ideas and devotions of an unauthorized and superstitious kind, and is unlawful.

(5.) That the said images or sculptured subjects are respectively additions to the fabric, ornaments, or furniture of the said cathedral church, and are decorations forbidden by law.

(1) 23 Q. B. D. 414.

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The bishop, in pursuance of s. 9 of the Public Worship Regulation Act, delivered his reply to the representation in the following terms:—

"We Frederick, by divine permission Bishop of London, having in pursuance of the provisions of the Public Worship Regulation Act considered the whole circumstances attending the above representation, are of opinion that proceedings should not be taken thereon for the following reasons:—

"The proposed proceedings have for their object the determination of the question whether a reredos shewing our Lord upon the Cross, in a conspicuous position immediately above the communion table, and also the Blessed Virgin Mary with the Child in her arms, in a conspicuous position a few feet above, has any tendency to idolatry, and whether its erection is permitted by law.

"The main question of principle here at issue has been already decided in the *Exeter case* (*Phillpotts* v. *Boyd* (1).) In that case the reredos shewed a figure of our Lord in the act of ascending to heaven, in a conspicuous position immediately above the communion table, and this reredos was held to be lawfully erected.

"The sole object of the proceedings now proposed is merely to determine whether there may be exceptions to the principle laid down in the *Exeter case* (1), and whether the reredos now erected in St. Paul's is such an exception. It appears to me impossible to say that the difference between the two erections is of very grave importance, or that one offers serious temptations to idolatry and the other does not.

"Litigation in these matters is sometimes necessary in order to settle disputed points of grave importance. But even in such cases litigation is a necessary evil. It keeps up irritation and party strife: it embitters men's feelings: it inflicts much mischief on the Church and on true religion; and it is only tolerable as a preventive of worse mischief that would otherwise follow.

"It is always possible after any great question of principle has been decided to keep up litigation indefinitely by raising minor points, and such litigation becomes more mischievous the longer

(1) Law Rep. 6 P. C. 435.

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it is continued, while the results obtained from it are of exceeding little value.

"I am satisfied that in the present instance the proceedings could not end in any result which would make up to the Church and to the religious life of the country for the mischief which must inevitably be inflicted on them by the litigation itself."

The prosecutors thereupon obtained a rule nisi for a mandamus to the bishop, directing him to transmit a copy of the representation to the persons complained of, viz. the Dean and Chapter of St. Paul's, and proceed therein in accordance with the Public Worship Regulation Act, 1874; or, in the alternative, directing the bishop to consider the whole circumstances of the case affecting the said representation without considering any other circumstances or taking into consideration reasons other than the circumstances of the case.

On argument the Divisional Court (Lord Coleridge, C.J., and Manisty, J., Pollock, B., dissenting) made the rule absolute for a mandamus in the first of the two alternative forms mentioned in the rule.

Sir R. E. Webster, A.G., and *Jeune, Q.C.*, (*Lewis Coward*, with them), for the Bishop of London, and *Jeune, Q.C.* (*Lewis Coward*, with him), for the Dean and Chapter of St. Paul's. The Act gives to the bishop a discretion; and, if he has duly exercised the discretion so given to him, no appeal from the bishop being given by the Act, the Court has no power to interfere. To establish their right to a mandamus, the complainants must shew either that the bishop has refused to exercise the jurisdiction given to him, or that he has exceeded that jurisdiction. If he has acted within his jurisdiction, then the Court, though they may think the reasons he has given and the conclusion he has come to wrong, has no power on an application for a mandamus to review them.

It is impossible to say that the bishop has declined jurisdiction. It appears from the reasons given by the bishop that he has carefully taken the circumstances of the case into consideration and exercised his discretion upon them. Where it appears that the bishop has honestly considered the circumstances

of the case in a judicial manner, and he has set out in his reasons certain matters which are circumstances of the case as those upon which he acted, it cannot be said that he has declined jurisdiction. It cannot be that the mere fact, that other circumstances can be shewn to have existed to which he does not allude in his reasons, is sufficient proof that he has not considered the whole circumstances of the case, and therefore has declined jurisdiction or exceeded his jurisdiction. It is sufficient if he honestly sets out the reasons on which he acts, and they appear to be founded on the circumstances of the case. Then can it be said that any of the matters on which the bishop relies in his reasons are not circumstances of the case, and that therefore he has exceeded his jurisdiction by taking such matters into consideration? It is clear that the expression "the whole circumstances of the case" includes collateral circumstances as well as those directly material to the issues: *Reg.* v. *Bishop of Oxford.* (1) It is impossible to contend that the decision in *Phillpotts* v. *Boyd* (2), with regard to sculptured figures on a reredos, and the principles enunciated in that decision as tests of the legality of such figures were not circumstances of the case which the bishop was entitled to consider in forming his opinion whether the proceedings should be taken. The principle there laid down was that the legality of the erection depended on certain questions, viz. as to the character of the sculpture on the reredos, to what end it was used, and whether it was in danger of being abused; and it was held that the figures, forming part of the connected representation of an historical subject set up for the purpose of decoration only, were not shewn to be illegal as giving occasion to idolatrous practices. The bishop was entitled to consider the nature of the erections in the two cases, and whether, applying the tests laid down by the Privy Council in *Phillpotts* v. *Boyd* (2), there was any material difference in point of principle between the present case and that case; he was entitled to consider the figures in question, and see whether, like those in *Phillpotts* v. *Boyd* (2), they were in the nature merely of a representation of historical events by way of decoration, and therefore, according to the principles laid down in that case, not of an idolatrous

(1) 4 Q. B. D. 245, at p. 275. (2) Law Rep. 6 P. C. 435.

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tendency; and, if he came to the conclusion that in fact there was no difference in point of principle between the figures in the two cases, or that the difference, if any, was so slight as not to be of importance, that was a circumstance on which he was entitled to act, in deciding whether proceedings should be taken. It is contended that the bishop's reply sufficiently shews that he has rightly apprehended the principles laid down in *Phillpotts* v. *Boyd* (1), and, applying them to the figures in the present case, finds that the figures in this case are decorative and not idolatrous. It may be that he was wrong in coming to the conclusion he did as to the similarity of the cases, but that would be a mistake within his jurisdiction and one which on an application for a mandamus, and in the absence of any right of appeal, the Court would have no power to review.

In *Hughes* v. *Edwards* (2) Lord Penzance, applying the principles laid down in *Phillpotts* v. *Boyd* (1), came to the conclusion that a sculptured panel representing Christ on the Cross was within the decision in that case. In *Clifton* v. *Ridsdale* (3) it was said by Lord Penzance that it was impossible to find a better test of the legality of such an erection than that laid down in *Phillpotts* v. *Boyd.* (1) How can it, then, be contended that the bishop was not, for the purpose of forming an opinion on the question he had to decide, entitled to consider the judgment in that case and the principles there laid down in order to see whether the figures in the present case were substantially different from or similar to those held legal in that case?

If the question as to the similarity of the figures in the two cases was one which the bishop had a right to consider, the Court cannot review his conclusion on the subject on mandamus. It must be observed that there is no allegation in the representation that superstitious reverence had been in fact paid or superstitious practices used in connection with these figures. In that respect the case is similar to *Phillpotts* v. *Boyd.* (1) The only allegation is that the figures tend to encourage ideas and devotions of a superstitious kind. Therefore, as in *Phillpotts* v. *Boyd* (1), the only question was as to the character of the figures.

(1) Law Rep. 6 P. C. 435. (2) 2 P. D. 361.
(3) 1 P. D. 316; 2 P. D. 276.

themselves. It was clearly competent to the bishop to inspect the figures themselves, or otherwise inform himself as to their character, and apply to them the principles laid down in *Phillpotts* v. *Boyd* (1), and in so doing he cannot be said to have exceeded his jurisdiction by considering that which is not a circumstance of the case.

With regard to what the bishop says in his reasons as to the evil of litigation, it must be observed that he does not put that forward as being per se any ground for the conclusion that proceedings should not be taken; what he says is in substance that the case is concluded by a previous decision, or, if there is any difference between it and the previous case, it is so slight that the importance of the matter at stake is not an equivalent for the mischief likely to be occasioned by the ligitation, and therefore that is a reason why proceedings should not be taken.

The same principle really applies in this case as in cases where there is an application for a mandamus to compel justices to hear and determine a case. If they have exercised their jurisdiction, then, however erroneously they may have exercised it, mandamus will not lie. Erroneous exercise of jurisdiction may be the subject of appeal, if an appeal is given. Here there is no appeal. The fact that the bishop is to state his reasons does not import that the Court can review them, except so far as they shew that the bishop has declined jurisdiction or has exceeded his jurisdiction. Of course if the bishop had proceeded on altogether inapplicable or irrelevant reasons, it might be held that he had not exercised a judicial discretion at all, and so had declined jurisdiction; but, if he has exercised a judicial discretion, as he clearly has done, mandamus will not lie. The provision that the bishop must state his reasons was probably inserted in order to act as a check on the arbitrary exercise of his discretion, and to provide a means of seeing whether the bishop had declined jurisdiction or exceeded his jurisdiction in the matter. Some of the expressions used by Manisty, J., in the court below seem to treat the case as if the bishop's decision involved the final decision of a question of law, whereas it only decides that no proceedings shall be taken under the Public Worship Regulation Act, 1874, on this parti-

(1) Law Rep. 6 P. C. 435.

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cular representation. The remedies which existed independently of the Act are not affected. It would also be open to the parties to present a fresh representation and bring any further considerations before the bishop to induce him to allow proceedings on it.

Under the Church Discipline Act, 3 & 4 Vict. c. 86, the bishop's discretion as to the issue of commissions was absolute: *Julius* v. *Bishop of Oxford.* (1) It was not intended to give any less discretion by the Public Worship Regulation Act, 1874. It is submitted that the terms of s. 9 shew that it was intended that, provided the bishop exercised a judicial discretion, he should have the fullest discretion to consider and form his opinion in relation to the whole circumstances of the case. The expression "after considering the whole circumstances of the case" was not intended to restrict or impose conditions on his discretion, but the reverse. It was held in *Reg.* v. *Bishop of Oxford* (2) that the discretion of the bishop under the Public Worship Regulation Act is absolute. [They also cited *Reg.* v. *Bishop of Chichester.* (3)]

Sir W. G. F. Phillimore, Q.C., for the Dean of St. Paul's.

Sir Henry James, Q.C., *Moulton, Q.C.*, and *Danckwerts*, for the prosecutors. The bishop had no doubt an absolute discretion under the Church Discipline Act: *Julius* v. *Bishop of Oxford.* (1) Under that Act safeguards were wanting which are provided in the Public Worship Regulation Act: for instance, anyone however little interested in the matter might start proceedings, whereas under the Public Worship Regulation Act they can only be started by certain specified persons of responsibility. Therefore it might be proper that under the earlier Act the bishop should have an absolute discretion; but it is submitted that it was intended with regard to proceedings under the Public Worship Regulation Act to alter that state of things and to secure the enforcement of the law, subject, however, to a discretion on the part of the bishop to stay proceedings in cases of a frivolous character. But the discretion so to be exercised by the bishop is a judicial discretion (see *Sarjeant* v. *Dale* (4)), and only arises after consideration of the whole circumstances of the case.

(1) 5 App. Cas. 214.
(2) 4 Q. B. D. 245.
(3) 2 E. & E. 209.
(4) 2 Q. B. D. 558, at p. 566.

Primâ facie the proceedings in respect of a breach of the law under the Act are to go forward, and the bishop is bound to take the necessary steps in furtherance of them. There is an absolute statutory duty to do so, unless a certain condition is fulfilled. The terms of s. 9 are express that the bishop shall transmit the representation as directed by the Act, unless he shall be of opinion "after considering the whole circumstances of the case" that proceedings should not be taken. His discretion therefore to stay the proceedings is conditional on consideration of the whole circumstances of the case; and he is to state his reasons, obviously in order to shew whether he has pursued his statutory authority; and they may be reviewed so far as they shew that he has not done so. If he does not consider the whole circumstances of the case, or, if, though he considers the whole circumstances of the case, he considers other circumstances which are not circumstances of the case, in either case he is not acting within his statutory power. He may be said in the one case to have declined jurisdiction, and in the other to have exceeded his jurisdiction. In either case, the condition on which he was entitled to stay the proceedings not having been fulfilled, he may be compelled by mandamus to take the steps required by the statute in furtherance of the proceedings. The proceedings can only be stayed if it be shewn that the bishop has pursued his statutory authority in staying them; and it lies on him to shew this by the reasons he gives. If he states reasons which are inadmissible because not founded on the circumstances of the case, he fails to do so. It is contended that, even if some of the reasons are inadmissible, as not founded on the circumstances of the case, it is fatal, for the Court cannot say which reason is the governing one. The reasons given by the bishop shew that he has misconceived the case altogether and that consequently he has not considered the whole of the circumstances of the case and has considered matters which are not circumstances of the case. The bishop must consider the representation as it is in reality, and take its statements as shewing the nature of the case alleged. If the bishop wholly misconstrues and misconceives the scope of the representation and the nature of the case set up by it, and therefore considers the circumstances not of the

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case before him but of a wholly different case, he does not pursue the authority given him by statute. Here the bishop wholly misapprehended the nature of the case as stated in the representation, and the effect of the decision in *Phillpotts* v. *Boyd* (1) as bearing on the case before him. He assumed that the two cases were in pari materiâ. The representation here alleges that an image representing our Lord on the Cross has been set up so constructed as to have the appearance of such an altar crucifix as was used in the pre-Reformation period, and to answer the purposes for which such a crucifix was intended: and also a figure of the Virgin; and that the figures are such as to conduce to idolatrous and superstitious ideas and practices. The decision in *Phillpotts* v. *Boyd* (1) has nothing to do with such a case as this. The figures in that case were a sculptured representation of the historical event of the Ascension. There was no cross or crucifix; it is expressly stated in the judgment that it was not suggested that any superstitious reverence had been paid or was likely to be paid to the figures. The question there was merely whether a reredos containing such figures was necessarily and per se illegal; and it was held that, the figures there being merely a decoration representing an historical event, and it not being suggested that they were in fact of an idolatrous tendency, they were not illegal. There is no similarity between such a case and that set up by the representation in the present case. The bishop's statements that the main principle here at issue has been already decided in the *Exeter case*, and that the sole object of the proceedings is to determine whether there may be exceptions to the principle thus laid down, clearly shew that he has misapprehended the scope of the decision in the case of *Phillpotts* v. *Boyd* (2) and that of the representation in the present case. He treats that decision as laying down a general rule with regard to the legality of such figures on a reredos, and as deciding that such figures are not illegal or idolatrous; whereas the question must be one of fact in each case, and that case merely decided that the particular figures there in question were lawful, it not being suggested that they were of a superstitious nature, a decision which cannot affect a case where the very gist of the representation is that the

(1) Law Rep. 6 P. C. 435. (2) Law Rep. 6 P. C. 438.

figures are in fact of an idolatrous and superstitious tendency. If, as would appear from his reasons, the bishop has not considered the particular images in question with regard to the question whether those particular images are of a superstitious character, because he wrongly supposed that the decision in *Phillpotts* v. *Boyd* (1) had decided generally that such images on a reredos were lawful, he has not considered the whole circumstances of the case. The bishop, by reason of his misconstruction of the decision in *Phillpotts* v. *Boyd* (1), and his supposing that it decided what it did not, appears not to have considered the whole circumstances of the case before him and to have considered matters which were not circumstances of that case.

Then, again, the subsequent observations of the bishop, with regard to the evils of litigation to the Church and the religious life of the country, shew that he has considered matters which are not circumstances of the case. Such considerations do not afford valid reasons for staying the proceedings which primâ facie the Act intends to go on; such reasons really impugn the policy of the Act, and in giving effect to them the bishop was not exercising his discretion in a judicial manner. He was in effect declining jurisdiction because he did not approve of the litigation contemplated by the Act. Where a person clothed with judicial discretion exercises his discretion with reference to circumstances which he is not legally entitled to consider, it is as if he had not exercised it at all: *Reg.* v. *Boteler* (2); *Reg.* v. *Adamson.* (3)

Sir R. E. Webster, *A.G.*, in reply. The bishop rightly appreciated the effect of *Phillpotts* v. *Boyd* (1). The only ground on which the figures there could have been declared unlawful was that they had an idolatrous tendency, and the Privy Council lay down certain propositions or principles, as canons by which to judge whether figures have such a tendency. The bishop in considering the circumstances of the case was clearly entitled to consider, and did consider, those principles as applied to the particular figures in question: and, if he thought that, substantially the same question having been already decided, it was not desirable it should be litigated again, he was acting within his

(1) Law Rep. 6 P. C. 435. (2) 4 B. & S. 959.
(3) 1 Q. B. D. 201.

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jurisdiction, even though he were wrong in point of fact or law. The language of Lord Selborne in *Julius* v. *Bishop of Oxford* (1) with regard to the bishop's discretion under the Church Discipline Act applies with equal force to the Public Worship Regulation Act, 1874.

Cur. adv. vult.

1889. Dec. 17. The following judgments were delivered:—

LORD ESHER, M.R. It is alleged on the part of the applicants for a mandamus that the bishop has either gone beyond the duty imposed upon him by the statute, or not undertaken such duty; or, to use another mode of expression commonly used in such cases, that he has either exceeded his jurisdiction or declined jurisdiction. To determine whether he has done either the one or the other, it is obviously necessary to consider what his duty or jurisdiction is, and, as it is imposed upon him by the 9th section of the Public Worship Regulation Act, 1874, for that purpose to construe the section. The controversy has mainly turned upon the phrase, "after considering the whole circumstances of the case." On the one side it is said that that is an enabling phrase, enabling the bishop certainly to go to the full length that he could go in exercising his discretion, if the phrase were not in the section, and there were nothing but the words simply giving the discretion, and perhaps enabling him to go further. On the other side it is contended that the words are words of limitation and restriction. It is not denied that the bishop has at some period to exercise a discretion, but it is said that his power or duty of exercising a discretion is limited, and does not arise unless and until he has considered the whole circumstances of the case in the sense that, if he has failed to consider each and every circumstance of the case, his power or duty of exercising a discretion has not come into play. I think that we must in construing the section have regard to the rule of construction laid down by Lord Selborne in one of the cases cited to the effect that it is useless to enter into an inquiry with regard to the history of an enactment, and any supposed defect in the former legislation on the subject, which it was intended to cure, in cases where the

(1) 5 App. Cas. 214, at p. 236.

words of the enactment are clear. It is only material to enter into such an inquiry where the words of an enactment are ambiguous and capable of two meanings, in order to determine which of the two meanings was intended. In the first place, therefore, we ought to look at the words of the section itself, and to read it according to the well-known canon, in order to see what the words in their ordinary grammatical sense in the English language mean as applied to such a subject-matter as that with which the section deals. The section says that, unless the bishop is of opinion, after considering the whole circumstances of the case, that proceedings should not be taken upon the representation, he shall transmit a copy of the representation to the person complained of, &c. Therefore, what the bishop has to do is to form an opinion as between the parties complaining and complained of as to whether the proceedings should go on and to act upon it. He is not to decide the controversy as to whether the things which have been done are contrary to statute or the ecclesiastical law. He is to form an opinion whether proceedings should not be taken upon the representation. That it is a matter of discretion cannot be doubted, and is not denied; and inasmuch as, though not a judge, he is a high public authority intrusted with the duty of saying whether the controversy shall or shall not be tried, I have no doubt that his decision on that matter, though not strictly a judicial decision, is in the nature of a judicial decision, and, therefore, that his discretion must be exercised in a judicial manner. The jurisdiction or duty of the bishop arises upon the delivery to him of the representation, and commences as soon as it is delivered to him. To see whether he has undertaken such duty or exceeded it, we must consider exactly what it is. It was argued that this duty of exercising his discretion does not arise until he has performed a preliminary duty, viz., that of considering the whole circumstances of the case in the sense that he must consider each and every of such circumstances, and, if he fails to consider any of them, his subsequent duty to exercise his discretion does not arise. Now, supposing that these words, "after considering the whole circumstances of the case," were not in the section, and that the discretion was given by the general words, "unless the bishop

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be of opinion that proceedings should not be taken upon the representation," it seems clear that the discretion so given would still be a judicial discretion, and the bishop in exercising it would be entitled to take all the circumstances of the case into consideration. Both Lord Cairns and Lord Selborne seem in the cases that have been cited to have thought that under such words as those the bishop would not be confined merely to the consideration whether he thought there was a primâ facie case or not against the person complained of with regard to the allegations of the representation. Both of them have said that the bishop, if he has a discretion to determine the preliminary question whether proceedings should be taken, may take other matters into account. It is argued that, though in the absence of the words in question the bishop might take other matters into account, the effect of the introduction of these words is that the bishop cannot act unless he takes each and every circumstance of the case into account. I am of opinion that, taking the words in their ordinary sense, they do not mean that the bishop must, as a preliminary and a condition precedent to his having any discretion in the matter, have considered each and every circumstance of the case. The words are, in my opinion, enabling words. They enable the bishop to go beyond a certain limit, and to go to any limit with regard to the circumstances he considers, subject only to the limitation that they must be circumstances of the case; and, if the bishop has honestly and fairly undertaken to consider the circumstances of the case, but, without wilfully or unfairly refusing to consider any such circumstance, has failed to consider some circumstances which may be shewn to have existed, and has considered others, then I do not think that he has failed to undertake the duty cast upon him. He has not refused to exercise the discretion given to him merely because he may not have considered each and every circumstance of the case. Then there is the other branch of the argument, viz., that as to excess of jurisdiction. I think that the bishop would have exceeded his jurisdiction if he had considered something which was not a circumstance of the case, and had acted upon it. That he should have considered it would not I think be enough; it would have to be shewn that he had acted upon it.

In order, therefore, to shew a refusal of jurisdiction it must be shewn that the bishop has refused to consider the circumstances of the case; in order to shew an excess of jurisdiction it must be shewn that he has considered and acted on something which is not a circumstance of the case. If the bishop has undertaken fairly to consider the circumstances of the case, and has not unfairly declined to consider any such circumstances, the mere fact that he has not considered some circumstances, if it can be shewn, does not shew that he has failed to exercise his jurisdiction; and if he has exercised his jurisdiction, and has not gone beyond it, the question whether he has exercised it rightly or wrongly is not a matter into which the Court can inquire. The bishop's duty is to form an opinion, and to state his reasons; and, if he has done so, acting within his jurisdiction, whether such opinion is right or wrong is not a matter for the issue of a mandamus. However wrong the Court may think the reasons given by the bishop, they have no power to interfere.

If this be the true construction of the section and the law of the matter, the sole duty of the Court when asked to grant a mandamus is to consider whether the bishop has honestly considered the case, not in the sense that he must necessarily have considered each and every circumstance of the case that can be shewn to have existed, but whether he has fairly considered the case; and also whether he has exceeded his jurisdiction by considering and acting upon something which is not a circumstance of the case. I think that the views I have expressed can be shewn not to be without authority. I think that there is considerable authority for them in the judgment of Cockburn, C.J., in the case of *Reg.* v. *Bishop of Oxford.* (1) It is true that that case was decided upon another statute, and that the construction of the Public Worship Regulation Act was not the actual subject-matter of decision, but it became necessary to consider the meaning of that Act, because it was argued that it had superseded the former Act, and repealed it by implication; and the Court could not deal with that point without considering the meaning of the Public Worship Regulation Act. The late Lord Chief Justice said in reference to that Act: "An absolute discretion is

(1) 4 Q. B. D. 245, at p. 275.

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given to the bishop, who is required to further the suit in the manner provided by the Act, 'unless he shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation,' in which case he is to state in writing the reasons for his opinion, which statement is to be deposited in the registry of the diocese, but apparently without any ulterior consequences; so that the bishop is not only made the sole judge and arbitrator whether the suit shall proceed, with reference to the nature of the offence charged, or the facts on which the charge may be founded, but is enabled to take into account collateral circumstances, in themselves affording no answer to the accusation, or satisfaction to the parishioners complaining that the public worship is conducted otherwise than according to the ritual of the Church as by law established." That is a statement by the late Lord Chief Justice, that the bishop has under the Public Worship Regulation Act what he calls an absolute discretion, and is entitled to take into account collateral circumstances. Lord Cairns in *Julius* v. *Bishop of Oxford* (1) has mentioned the kind of collateral circumstances which may be gone into. The bishop may bring his own knowledge of facts to bear: he may consider the expediency of the particular litigation with regard to the welfare of the Church; he may also consider the position of a clergyman complained of, whether he is likely to repeat the matter complained of, and anything that may have happened, such as a promise made by the clergyman to himself not to repeat it. All these are obviously collateral circumstances, and not part of the facts of the controversy. The words "the whole circumstances of the case" therefore include all such collateral circumstances, the only limitation being that the bishop must not go into and found his opinion upon a circumstance which cannot even collaterally be a circumstance of the case.

It has been considered by two judges in this case that the bishop has either not undertaken jurisdiction or exceeded his jurisdiction. We must therefore examine what he has done. I do not hesitate to say that, if the bishop were to act upon such a consideration as this, if he were to say that he considered all

(1) 5 App. Cas. 214.

litigation with regard to Church matters objectionable, and therefore, whatever case were brought before him, he should not allow it to proceed; and it could be shewn that he had acted on this view; then it would be clear that he had taken into account something which was not a circumstance of the particular case, and had exceeded his jurisdiction. Again, if in a case like the present concerning the legality of a reredos, he came to the abstract conclusion that the decision in *Phillpotts* v. *Boyd* (1) had decided that any reredos was legal, and that therefore, whenever any representation was made to him about a reredos, he should say that he would inquire no further into the particular case, and would not allow it to proceed, then I think that he would be refusing to undertake the duty imposed upon him, and acting on a circumstance which was not a circumstance of the case. But I think that, when he has to consider the question whether proceedings on a representation that a reredos is unlawful should be taken, he is entitled to consider, amongst other things, the application of a decided case on the subject to the case before him, to consider whether there has been a rule laid down in reference to such cases, and, if so, what is the application of the principles thereby established to the particular case with which he has to deal? I think that in so doing he would be considering a circumstance of the case. Therefore the bishop had a right to consider what were the principles laid down in *Phillpotts* v. *Boyd* (1), and how they applied to the present case. The principle was laid down in that case that, when it has to be determined whether sculpture on a reredos is lawful, the points to be considered are the character of such sculpture, for what purpose it has been set up, to what end it is used, and whether it is in danger of being abused. According to the judgment in that case you are to look at the reredos in question for the purpose of seeing whether the sculpture upon it is clearly and beyond doubt merely a representation of an historical scene, and put up for purposes of decoration, and, if there should be any doubt on the subject, then you must consider to what end it is used, and whether there is any danger of its being abused. After having considered the circumstances

(1) Law Rep. 6 P. C. 435.

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of the particular case, I think that the bishop would be entitled to consider how the principles so laid down applied to them. Having considered the application of *Phillpotts* v. *Boyd* (1), I think it would be proper for the bishop, if he had the means of doing so, to consider how in any subsequent cases on the same subject, such for instance as the case of *Hughes* v. *Edwards* (2), and that of *In re St. Lawrence, Pittington* (3), the principles laid down in *Phillpotts* v. *Boyd* (1) had been applied, and how far such application assisted him in applying such principles to the case before him. The application of the principles of *Phillpotts* v. *Boyd* (1) in such cases would be a circumstance of the case before him. Having regard to the principles to be gathered from the previous cases, he might look at the reredos in question and judge of it by his own eyes, or he might receive an account of it, and then, applying the principles laid down, he would be entitled to consider whether upon such principles there was any material difference between the case before him and those previously decided. He would have a right to say: in both these cases there are sculptured figures on a reredos; it is true that in the one case the figure of our Lord is on the Cross, in the other not, but the principle laid down in *Phillpotts* v. *Boyd* (1) is that figures which, taken by themselves, might under certain circumstances conduce to idolatry, may be unobjectionable when they are merely a representation of an historical event put up for the purposes of decoration. And applying this principle he might come to the conclusion that the sculpture in the case before him, like that in *Phillpotts* v. *Boyd* (1), was mere matter of decoration, and therefore that there was no substantial difference between the two cases in point of principle. Or he might think that, if there were some differences in detail, yet they were so minute that litigation in respect of them would be of no benefit to the Church, and, if the parties concerned would take a reasonable view, they were not such as really to be of any importance. These are matters which I think he might consider as being circumstances of the case in order to form an opinion whether the proceedings should not go further.

(1) Law Rep. 6 P. C. 435. (2) 2 P. D. 361.
(3) 5 P. D. 131.

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That being so, we must consider what it is that the bishop has done in this case in order to see whether he has declined jurisdiction or exceeded his jurisdiction. He has formed an opinion. Nobody denies that he has formed that opinion honestly. Nobody can deny that he has endeavoured to perform the duty cast upon him. But it was said that he has unintentionally gone beyond it. It was suggested that he has not considered some of the circumstances of the case, or has not shewn that he has considered all of them, or that he has considered matters which are not circumstances of the case.

The onus lies on those who ask for a mandamus to shew that there has been a refusal or excess of jurisdiction. It was argued that, inasmuch as the statute imposes on the bishop the duty of taking certain steps, unless he comes to the opinion that the proceedings should not go further on consideration of the "whole circumstances of the case," such consideration is a condition precedent to his power to stop the proceedings, and it was for the bishop to shew that he had considered all the circumstances of the case; but I think that that argument is absolutely wrong. The onus lies on those asking for the mandamus.

The bishop has given his reasons as he was required to do by the Act. Whether they are good or bad reasons this Court has no right to inquire. The only way in which they can be made use of against him is by shewing from them that he has taken into account something that was not a circumstance of the case, and acted upon it, or that he has not considered the circumstances of the case but some other circumstances. Here there was no evidence given beyond the statements of the representation itself and the reasons given by the bishop. No such evidence was given as that the bishop had stated in reference to the case that he objected to all litigation on Church matters. We have therefore to determine the question whether there has been a refusal or excess of jurisdiction by the bishop solely on the terms of his reply taken with the reference to the terms of the representation. I decline to enter into a minutely critical examination of the particular expressions made use of by the bishop. We must look at his reply as a whole, and consider whether, fairly interpreting it, we can see from it that he has done what is alleged.

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It begins thus: "Having in pursuance of the Act considered the whole of the circumstances;" so that he says that he has considered the whole of the circumstances, and there is no evidence, unless what follows be such evidence, that the statement is not true. He goes on, "the proposed proceedings have for their object the determination of the question whether the reredos shewing our Lord upon the Cross, in a conspicuous position immediately above the communion table, and also the Blessed Virgin Mary with the Child in her arms, in a conspicuous position a few feet above, has any tendency to idolatry, and whether its erection is permitted by law." That is only a statement of the question, and, unless it is wrongly stated or shews that the wrong question has been considered, it is immaterial. Then he proceeds "the main question of principle here at issue has been already decided in the *Exeter case* (*Phillpotts* v. *Boyd* (1))." The fair meaning of that appears to me to be that the principles to be applied by the bishop had already been decided in the *Exeter case* (1), and that he had to apply those principles to the present case. I think that that is a true statement. "In that case," he says, "the reredos shewed a figure of Our Lord in the act of ascending to heaven in a conspicuous position immediately above the communion table, and this reredos was held to be lawfully erected." No doubt he does not say that the reredos was held lawful because the figure was subsidiary to a representation of a scene or event, but there is nothing wrong in the statement so far as it goes, and, if there had been, I do not think that would have been ground for a mandamus. It would have been a mistake of the bishop acting within his jurisdiction. "The sole object of the proceedings now proposed is merely to determine whether there may be exceptions to the principles laid down in the *Exeter case* (1), and whether the reredos now erected in St. Paul's is such an exception." That does not seem to me to be an accurate expression of what I think the bishop meant. The object was not to determine whether there could be exceptions to the principles laid down in the *Exeter case* (1), but to determine whether the case in question came within the principles so laid down or was outside them. That is what I think the bishop

(1) Law Rep. 6 P. C. 435.

meant. I do not think he meant that there could not be an exception to the principles laid down in the *Exeter case* (1). "It appears to me impossible to say that the difference between the two erections is of very grave importance or that one offers serious temptations to idolatry and the other does not." That shews I think what he meant by the previous statement that the object was to determine whether there could be exceptions to the principles laid down in the *Exeter case* (1). I think the meaning is that it was to determine whether there were substantial differences between the two erections. I do not think that the bishop has expressed himself quite accurately in this part of the reply, but it is no ground for a mandamus that his reasons are not quite clearly expressed. Then he goes on to make certain general statements about the evils of litigation on ecclesiastical matters. And, if he had acted on those taken alone, it may be that he would have been wrong. But what he does is after enunciating certain general propositions to apply them to the circumstances of the particular case, and he is therefore determining on the circumstances of the particular case. He says, "litigation in these matters is sometimes necessary in order to settle disputed points of grave importance. But even in such cases litigation is a necessary evil. It keeps up irritation and party strife, &c.;" but then he proceeds to apply those general propositions to the particular case; "It is always possible after any great question of principle has been decided to keep up litigation indefinitely by raising minor points, and such litigation becomes more mischievous the longer it is continued while the results obtained from it are of exceedingly little value. I am satisfied that in the present instance the proceedings could not end in any result which would make up to the Church and to the religious life of the country for the mischief which must inevitably be inflicted upon them by the litigation itself." The general result of the whole does not seem to me to be anything but to shew that the bishop has undertaken and honestly endeavoured to consider the particular case, and all the circumstances of it to which he had access. On such consideration, and acting within his jurisdiction, he has come to an opinion: and it is wholly beyond the power of the Court to review that opinion.

(1) Law Rep. 6 P. C. 435.

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With regard to the grounds upon which the majority of the judges acted in the Court below, Manisty, J., says that the bishop has misconstrued the decision in *Phillpotts* v. *Boyd* (1), but, assuming that he has, it was within his jurisdiction to consider it, and if so, it was a mistake within his jurisdiction which might be the subject of an appeal, if there were a right of appeal, but not of a mandamus. Then he goes on to say that the bishop has not considered another case on the subject that was decided in the Court of Arches, but in which there was no appeal, and that the bishop was wrong in refusing to allow this case to proceed in order that the matter might be decided by a superior Court. But with all respect to the learned judge, he does not know whether the bishop did consider that point or not. But even if he did not, there is nothing to shew that any one called it to his attention, or to shew that he wilfully refused to consider it; and, as I have already said, I do not think that the mere fact that he has not considered each and every circumstance of the case shews that he has refused to exercise or exceeded his jurisdiction. If he did consider this point, the learned judge thinks he was wrong in not acting upon it; but, even if he was, it was no part of the functions of the Court to review the conclusions of the bishop acting within his jurisdiction. The Lord Chief Justice seems to have thought that the bishop had come to a certain conclusion with regard to the decision in *Phillpotts* v. *Boyd* (1), and that having misconstrued that case he has consequently given an irrelevant reason for his opinion. This, with all respect, appears to be only a circuitous mode of saying that the bishop has misconstrued the decision in *Phillpotts* v. *Boyd* (1), but, if the decision in that case, as applicable to the case before him, was a circumstance which it was within the bishop's jurisdiction to consider, any misconstruction of that case was only a mistake made by the bishop within his jurisdiction, and so no ground for a mandamus. I think, with deference to the Lord Chief Justice, that the fear of giving too dictatorial a power to the bishops has caused him to consider this matter rather as if he were considering the propriety of the provisions of the Act than the question whether the bishop has acted within those provisions. For these reasons I venture to differ from the majority

(1) Law Rep. 6 P. C. 435.

of the Queen's Bench Division, and to think that according to the ordinary rules of law with regard to mandamus no case has been made out for the issue of the writ, and therefore this appeal should be allowed.

LINDLEY, L.J. Under ordinary circumstances I should have contented myself with saying that I concur with the Master of the Rolls. But the case is one of considerable importance, and, out of deference to those from whom I differ, I have thought it right to put my judgment into writing.

The Public Worship Regulation Act, 1874, materially altered the law respecting the right to take legal proceedings in various ecclesiastical cases and respecting the mode of proceeding in such cases. Under the Church Discipline Act (3 & 4 Vict. c. 86, s. 3), any person, male or female, whether a parishioner or not, and whether a member of the Church of England or not, could complain to the bishop of any clerk in holy orders. Under the Public Worship Regulation Act (37 & 38 Vict. c. 85, ss. 6, 8), the persons complaining must be an archdeacon or a churchwarden of the parish or any three male persons of full age, parishioners of the parish referred to in the complaint, and they must be members of the Church of England. The Church Discipline Act contains no express provision applicable to cathedrals or collegiate churches, whereas the Public Worship Regulation Act does (s. 8). The complainants in the case of a cathedral must be three male persons of full age, inhabitants of the diocese in which the cathedral is situate and must be members of the Church of England (ib.). The Church Discipline Act merely declared that upon complaint being made to the bishop it should be lawful for him to issue a commission to inquire into the matter complained of (s. 3), or to send the case to the Court of Appeal of the province (s. 13). There was no provision requiring him in exercising this power to give any reasons for the course he might think fit to adopt, and it was held, first in *Reg.* v. *Bishop of Chichester* (1), and later in the *Bishop of Oxford's Case* (2), that the bishop had a complete discretion as to whether further proceedings should or should not be taken, and that his only legal duty (if any) in the

(1) 2 E. & E. 209. (2) 5 App. Cas. 214.

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matter was to hear and consider the application. (See per Lord Blackburn, 5 App. Cas. p. 240). The Public Worship Regulation Act, 1874, is materially different, for by s. 9, on the receipt by the bishop of a proper representation, it is his duty within twenty-one days to take certain steps to have the complaint investigated and determined, "unless he shall be of opinion after considering the whole circumstances of the case that proceedings should not be taken on the representation." Moreover, if he should be of this opinion, he is to state in writing the reason for his opinion, and such statement is to be deposited in the diocesan registry and a copy of it is to be transmitted to the complainants and to the person complained of. The statute, therefore, plainly casts upon the bishop the responsibility of stopping further proceedings. He is not required to sanction them; for, unless he is of opinion that they should be stopped, he is bound by the statute to do what is necessary to have the complaint heard and determined in one or other of the modes prescribed by the statute. In this state of the law three questions arise, viz.:—(1.) What is the duty of the bishop as regards forming an opinion that proceedings should not be taken? (2.) Has he in this case performed that duty? (3.) What jurisdiction has the High Court over him in the matter?

(1.) With respect to his duty. His duty is to form an opinion. Formation of an opinion is very different from a mere exercise of will. It is clearly not competent for the bishop simply to stay further proceedings by an arbitrary exercise of his will. He must be of opinion that they ought to be stayed. To form an opinion it is obviously necessary that he must consider the case to which his attention is directed. There could be no doubt on this point even if the statute went no further; but the statute expressly requires him to consider "the whole circumstances of the case." These words are to my mind very important. They shew that he is to consider more than what in legal language may be described as the issues raised by the complainants. "The whole circumstances of the case" embrace more than the matters directly in controversy. The expression includes circumstances of time and of place, and the consequences which will follow in any particular case if the proceedings are stayed, and also those

which will follow if they are not. The Court has no right to narrow these words. The effect of them is on the one hand to emphasize the duty of the bishop fairly to consider the particular case before him, and honestly to form an opinion upon it; and on the other hand the effect of the words is not only to empower him but to require him to take a wide and not a narrow view of the case; to consider all its circumstances—i.e., every circumstance material for forming an opinion upon the question whether proceedings should not be taken. The bishop, as will be further pointed out presently, is not at liberty to set any law of the land at defiance, and he cannot, under cover of forming an opinion under the power conferred upon him by this section, prevent the law from being enforced against persons who persist in doing that which he knows to be plainly illegal. But what is legal or illegal with respect to images, crosses, crucifixes, and other things of the sort in churches depends on whether they do or do not, or will or will not, encourage or lead to idolatrous or superstitious worship in the place where they are or are to be put; and, if in any particular case the bishop is of opinion that a particular image, cross, crucifix, or other piece of sculpture has no tendency to encourage such worship, he is, in my opinion, perfectly justified in stopping litigation on the subject. In every such case it appears to me that the bishop may properly consider what are called the interests of the Church in the matter, by which I understand the advantages or disadvantages (to other persons than those complaining and complained of) which will result from stopping further litigation. To exclude such considerations would, in my opinion, be unduly to limit his power and duty to consider "the whole circumstances of the case."

The bishop is empowered and is bound to consider "the whole circumstances of the case," but it may well happen that one or two circumstances render all the others comparatively immaterial. When that does happen the bishop need no longer consider them. He is not bound to waste his time in thinking over any circumstance which is or which becomes unimportant. He has considered it as soon as he has made up his mind that it requires no further consideration. Having considered "the whole circumstances of the case" and come to the opinion that proceedings

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should not be taken on the representation, the bishop's next duty is "to state in writing the reason for his opinion." This must mean his reason for the opinion at which he has arrived; the reason which has influenced him and on which his opinion is based. If he does this he discharges his duty in this respect, even although other persons may think the reason unsatisfactory. Whether his reason can be reviewed by any other tribunal is an entirely different question which I will examine presently, but so far as the bishop is concerned he has complied with the statute.

(2.) I pass now to the second question—has the bishop in this case performed his statutory duty? It is urged that he has not, because, first, he has misapprehended the case, and, secondly, he has considered circumstances outside it and which ought not to have influenced him. The contention that the bishop has misapprehended the case is based upon his view of the *Exeter Case* (1) and of its bearing on the present case. The differences between the two are obvious enough. In the *Exeter Case* (1) there was no representation of a crucifix, nor of the Crucifixion, nor of the Virgin Mary; nor was there in that case any suggestion that any superstitious reverence had been or was likely to be paid to any figures forming part of the reredos. The reredos in St. Paul's, which the bishop in this case had to consider, does contain a representation of the Crucifixion and of the Virgin Mary, and the representation made to the bishop states that these do tend to encourage superstitious devotions. Notwithstanding these differences, the bishop states in his reasons that the main question of principle here at issue has been already decided in the *Exeter Case* (1); and that the sole object of the proceedings now proposed is merely to determine whether there may be exceptions to the principle there laid down, and whether the reredos in St. Paul's is such an exception. He further states that it appears to him impossible to say that the difference between the two erections is of very grave importance, or that one offers serious temptations to idolatry and the other does not. These statements of the bishop shew, to my mind, conclusively that he has considered the present case; that he has compared it with the *Exeter Case* (1); that he has come to the conclusion that the sculptures complained of

(1) Law Rep. 6 P. C. 435.

in the St. Paul's reredos are parts of an erection which is decorative in its object and character, and are not likely to encourage superstitious devotion. This, in my opinion, is the fair meaning of the bishop's statement; and, this being its meaning, he has not, in my opinion, misapprehended this case in the smallest degree. Whether the reredos in St. Paul's does or does not tend to encourage superstitious reverence or idolatry is a question of fact or of opinion. The complainants say it does, and they want to have that question tried. The bishop has considered this very point and thinks that the reredos has no such tendency. If he be right, the *Exeter Case* (1) shews that the reredos in St. Paul's is not unlawful; if he be wrong, he will have made a mistake, the effect of which I will consider presently. But, right or wrong, he has not misapprehended the case before him, but has considered it carefully as by law he was bound to do. It is next contended that the bishop has considered circumstances outside the case, and which ought not to have influenced him. His observations on litigation on such a matter as the reredos shew, it is said, that he has exceeded his power, and that he has not performed the duty imposed upon him by the statute. The bishop's observations are, however, made with reference to the case before him. He has already stated in effect that he apprehends no danger of the reredos being perverted to superstitious or idolatrous worship; and, that being so, he deprecates litigation on the subject. Here again his view of the innocent tendency of the reredos fully justifies him, in my opinion, in considering the effect of litigation about what appears to him so harmless an erection. If he had taken a different view of the tendency of the sculpture, the case would have been entirely different. The conclusion at which I have arrived on this part of the case is that the bishop has performed the duty imposed upon him by statute. But he may have made a mistake, and this leads me to examine the last question which arises—viz., (3) what jurisdiction the High Court has over him.

The Public Worship Regulation Act gives no appeal from the refusal of the bishop to allow proceedings to be taken on the representation made to him. Nor is there any appeal from

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such refusal under any other statute or law. It follows that his decision is final and that there is no appeal from it. If he has made a mistake, it cannot be rectified; and whether the mistake is one of fact or one of law is immaterial. The only remedy is to lay before him a fresh representation pointing out the supposed mistake. He could then and, if satisfied that he ought, he, of course, would correct his mistake by not staying proceedings on the renewed representation. But the High Court has no jurisdiction over him on the ground that he has made a mistake; nor can it review his reasons because those reasons appear to the Court unsatisfactory. The law upon this point was so fully examined in the case of *Julius* v. *Bishop of Oxford* (1) that it is unnecessary to enlarge upon it.

But it would be a great mistake to suppose that the High Court has no jurisdiction over bishops in such cases as those now under consideration. The duty of every bishop, as of every subject, is to obey the law, whether he approves it or not, and, if he fails to perform that duty, he immediately becomes amenable to the High Court. If a representation is made to a bishop under the Public Worship Regulation Act, the bishop has no right to stay proceedings upon it until he has considered the whole circumstances of the case, and come to the opinion that proceedings upon it should not be taken. If he stays proceedings without considering the case, he can be compelled by mandamus to perform his duty; so, if he refuses to state his reason in writing, a mandamus would lie. By requiring the bishop to state his reason in writing, to deposit it in the registry, and to send copies to the parties, the legislature has done much to ensure a careful consideration of the case under a due sense of responsibility and has rendered it possible for a Court of Law to ascertain whether the bishop has done his duty or not. His duty is to consider each particular case submitted to him, to give his mind to that, and not to stay proceedings respecting it, unless he is of opinion that in that particular case proceedings ought to be stayed. It is not to be supposed that a bishop is unworthy of the trust reposed in him by the legislature, nor that he will not honestly endeavour to perform it. But if any bishop should be so ill-advised as to set

(1) 5 App. Cas. 214.

himself against the law, and to stay proceedings with a view to defeat the law, he would be disregarding his duty; and the Court would not be imposed upon by any specious argument to the effect that the bishop had duly considered the case. In such a case a mandamus would clearly lie, and this is the proper answer to many of the ingenious hypothetical cases suggested in the course of the argument. *Reg.* v. *Boteler* (1) and *Reg.* v. *Adamson* (2) illustrate the application of the law to such cases. It was urged that, by requiring the reasons for a stay of proceedings to be put into writing, to be deposited in the registry, and to be transmitted to the parties, the legislature must have intended that the reasons given by the bishop should be capable of being reviewed by some Court. I cannot myself come to this conclusion, for, as already pointed out, there are other objects to be attained by these requisitions quite sufficient to account for their introduction into the statute. Whether, in this particular case, the bishop is right or wrong in his view of the alleged tendency of the reredos I do not pause to inquire. He has not decided anything whatever as to its legality or illegality. He had no right to decide that question even as between the complainants and their opponents at the stage at which he stopped the proceedings, nor indeed at any stage without their consent. All that he has done is to say that, having considered the whole circumstances of the case, he is of opinion that proceedings should not be taken upon it. The responsibility of saying this is upon him. If he has bonâ fide considered the case and come to the conclusion that future proceedings should be stayed, he has a right to say so, and it is his duty to say so. So long as he acts in obedience to the law his opinion cannot be questioned. The attempt to shew that he has not duly considered the case, i.e. has not performed the duty imposed upon him by the statute, has, in my judgment, entirely failed, and this appeal must be allowed, with costs here and below.

LOPES, L.J. To follow two such exhaustive judgments, in both of which I entirely concur, is no easy matter; still, the case being so important, and as we are reversing the decision of the

(1) 4 B. & S. 959. (2) 1 Q. B. D. 201.

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Queen's Bench Division, I have committed my judgment to writing, putting it in the shortest possible compass, and I will read it.

The considerations upon which the decision in this case depends are, in my opinion, more limited than those which have been advanced in argument, or which were discussed in the judgments in the Court below. Abstract propositions of law and fact have been debated which it is not necessary to decide in order to determine the question now before the Court. Whether the order nisi for a mandamus should be made absolute depends on the true construction of ss. 8 and 9 of the Public Worship Regulation Act, 1874. It does not seem material in detail to consider the law up to that time. It is clear from the decision in *Julius* v. *Bishop of Oxford* (1) that up to that time the bishop under the Church Discipline Act had a discretion with which the temporal Court could not interfere, and the argument is pertinent that the legislature would not be likely to take away that discretion without using clear and unmistakable language to that effect. But it is admitted that under the Public Worship Regulation Act, 1874, the bishop has a discretion, but, it is said, a different kind of discretion, and of a more limited character than that which he possessed before that time. That it is different I agree, but that it is more limited I do not admit. It is a discretion which must be exercised in accordance with the terms of the statute, but when so exercised, it is as large and as incapable of being reviewed as was the discretion vested in the bishop before 1874.

I will now construe the 9th section of the statute as I understand it. Sect. 8 deals with the representation, which must now for the first time be made by somebody interested, and in this respect is different from the Church Discipline Act, where the bishop may be put in motion by anybody. Then s. 9 provides that the bishop is within twenty-one days after receiving the representation to transmit it, unless he shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, in which case he shall state in writing the reason for his opinion. The bishop is bound

(1) 5 App. Cas. 214.

to transmit unless he complies with this requirement. It is a condition precedent to his staying proceedings. I think these words are partly enabling and partly restrictive; enabling as declaring that the bishop may consider the whole circumstances of the case, by which I understand not only the direct circumstances to which his attention has been called by the representation, but also all other surrounding and collateral circumstances which are material to be considered; enabling, therefore, as enlarging the basis on which the discretion may proceed; restrictive as requiring him to state his reason in writing, and thus placing a fetter upon any arbitrary or capricious exercise of his discretion. An arbitrary or capricious exercise of his discretion would be no exercise at all. Before the Act of 1874 such an exercise was possible, and it could not have been reviewed, because there was no means by which it could be examined or discovered. There are several objects, it may be suggested, which the legislature contemplated when it required the bishop to state his reason. First, that which I have already stated; namely, to make it impossible for a bishop to act from mere caprice; secondly, to give publicity to the grounds on which he was acting; thirdly, to inform the complainants, and thus give them an opportunity of amending, if they thought fit, their representation. But I am clear that the legislature never intended to fetter an honest exercise by the bishop of his discretion, or, so long as the statutory requirements were complied with, to make that reviewable by mandamus which was not reviewable before. If the reason or reasons given by the bishop was or were irrelevant to the matter in hand, if they amounted to no reason, were nugatory or illusory, I doubt not but that a mandamus would go, because the bishop would not have exercised such a discretion upon the matter as could be considered in point of law a discretion which he was justified in exercising. In point of fact he would have exercised no discretion. As to the sufficiency of the reason or reasons either in law or in fact no temporal Court can inquire; that is a matter for the bishop, and the bishop alone. A Court of Law does not sit as a Court of Appeal from the bishop to say whether he has exercised his discretion, if he has one, wisely or not, though if he has no discretion it may

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compel him to do his duty and act. If there is any reason put forward upon which the exercise of the bishop's discretion may properly proceed, and the bishop honestly exercises it, in my opinion a mandamus will not go. I believe this to be the law, and the principle which has always governed the issuing a writ of mandamus to an inferior tribunal. To hold otherwise would be to give an appeal by mandamus, when no appeal is given. It would be turning the right to a mandamus into a right of appeal for reasons and opinions of the bishop when he has exercised his discretion.

But it is said "after considering the whole circumstances of the case," are not words enabling the bishop to take all the circumstances of the case, whether direct or collateral, into his consideration, but compelling him to take into consideration every circumstance, both direct and collateral, and, if he omits one material circumstance, mandamus should go. I entirely disagree with this contention. The bishop may consider one material circumstance, think it enough, and, disregarding any others, found his opinion upon that. For instance, in this case he might have said, "I have considered the allegation in the representation that these images tend to encourage ideas and devotions of an unauthorized kind. I think they are church decorations, and have no such tendency;" and this, though there may be other circumstances in the case, which he might, if he thought fit, have considered. But it seems unnecessary to pursue this contention, for I am of opinion that in this case the bishop had considered the whole circumstances of the case, and nothing which is not a circumstance in the case material for his consideration. The only way to gauge the circumstances which he has considered is to look at his reasons. I find nothing in them indicating any omission or commission; I mean any act of omission in not considering any material circumstance, or act of commission in considering any immaterial circumstance. In order to justify this mandamus the bishop's reasons must lead the Court to the conclusion that he has considered irrelevant circumstances, to the exclusion of relevant, or that his reasons are futile, and he has thus, as I have said before, exercised no discretion at all. This being my opinion, it is unnecessary to

consider the matter any further, because it cannot be, and is not, suggested that he has considered irrelevant reasons to the exclusion of relevant, or that his reasons are futile. The suggestion, so far as I can understand it, is that he has considered more than he ought.

I desire, however, to express the construction which I place on the language of the bishop in his reply to the representation. He says, "I have considered the whole circumstances attending your representation. I understand that you wish to litigate whether the images described in your representation have any tendency to idolatry, and whether their erection is permitted by law. I have looked at these images. I am well acquainted with the reredos at Exeter. I have carefully read the decision in *Phillpotts* v. *Boyd.* (1) Between the images, which in that case were decided not to be idolatrous, and the images referred to in your representation there may be differences in detail, but those differences, if any, are so unsubstantial and insignificant that they are governed by the same principle as that laid down in *Phillpotts* v. *Boyd.*" (1) Then the bishop proceeds to speak of litigation; he lays down no hard and fast rule against litigation; on the contrary, he says it is sometimes necessary, but undesirable where the matter is trivial and the result doubtful. He means that he doubts if there is any breach of church discipline in this case; that if there is, it is trivial and not of sufficient substance to justify litigation. He does not put forward litigation as an abstract and independent reason, but rather as an amplification of what he has said before. I cannot but think that this is the meaning of the bishop's language, and that any one carefully reading it would so understand it. It is said the bishop has misapprehended *Phillpotts* v. *Boyd.* (1) I do not think he has; on the contrary, he has, in my judgment, correctly understood it and rightly applied the principles there laid down to the present case. But if he misapprehended *Phillpotts* v. *Boyd* (1), provided the consideration of that case was in his discretion, it would be no ground for a mandamus. The decision in that case was a circumstance for him to consider. Litigation and the probable result of litigation was also a matter which he

(1) Law Rep. 6 P. C. 435.

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was entitled to regard. In my judgment the bishop has given in writing reasons upon which the exercise of his discretion may proceed, and has exercised that discretion honestly. He is not called upon to consider the whole circumstances of the case, as contended for by the learned counsel for the complainants, but, if he is, in my opinion the bishop has considered every material circumstance, both direct and collateral, and has not considered any circumstance which was irrelevant. The learned judges in the Court below, whose decision prevailed, appear to me to have been terrified by the extent of the power and responsibility, which, if his contention was maintained, would be reposed in the bishop. If the construction of the 9th section of the Act of 1874 is clear, it appears to me this is a matter with which we have no concern. Many of the arguments urged by the learned counsel for the complainants would no doubt have been most material matters to consider when the bill was passing through parliament but are inapplicable now. The judges do not make the law; they administer it, and that however much they may disapprove or dislike it. Some people may think it undesirable that bishops should possess so large a discretion as that which we think, under the Act of 1874, they are entitled to exercise. It is said that bishops are human, and may abuse the discretion reposed in them. So may judges and other high functionaries to whom great powers are intrusted. The guarantee for their integrity and honest discharge of their duties is their antecedents and the force of public opinion. I venture to think that, having regard to the high character of the men in whose hands discretion is placed by the Act of 1874, the risk of abuse is remote, and one which the legislature might safely determine to encounter. I am of opinion that the decision of the Queen's Bench Division should be reversed and the rule for a mandamus be discharged.

Appeal allowed.

Solicitors for prosecutors: *Wainwright & Baillie.*

Solicitors for Bishop of London and Dean and Chapter of St. Paul's: *Lee, Bolton & Lee.*

Solicitors for Dean of St. Paul's: *Brooks, Jenkins & Co.*

E. L.

IN RE PAUL. EX PARTE EARL OF PORTARLINGTON. 1889 *Nov.* 19.

Landlord and Tenant—Compensation for Improvements—Time for giving Notice of Claim—Tenant holding over—Custom of the Country—Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 7.

By s. 7 of the Agricultural Holdings Act, 1883, "a tenant claiming compensation under this Act shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim."

Where the tenant of a farm was entitled, under the custom of the country, to hold over a portion of the land for four months after the expiration of his notice to quit the farm:—

Held, that the "determination of the tenancy" took place when the tenant's holding under the custom of the country ended; and therefore that a notice of his claim for compensation, given two months before that time, was good.

MOTION for a writ of prohibition directed to J. D. Paul to prohibit him from further proceeding on an order made on June 24, 1889, by the judge of the Dorchester County Court.

In 1880 the applicants for a prohibition let to Paul a farm in the county of Dorset containing about 1200 acres. His tenancy commenced in October 11, 1880, and he then entered upon the farm; but the outgoing tenant, in accordance with the custom of the country, held over about 160 acres of meadow land until the following February, and the barns, rickyards, and some of the outbuildings until the following July.

Paul continued tenant of the farm until 1887, when a new agreement for a tenancy was entered into between himself and the applicants. This agreement provided that he should be tenant of the farm from year to year, the tenancy to commence on October 11, 1887, and that it should be determined by six months' notice to quit given by either of the parties thereto.

On February 26, 1888, Paul duly gave to the applicants a notice to quit at the expiration of six months, ending on October 11, 1888, and on October 11, 1888, he did quit and deliver up to the applicants possession of about 1000 acres of the farm, but, in accordance with the custom of the country, he held over the possession of about 200 acres of meadow and other lands until February 11, 1889, and under the same custom he held over the

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barns, rickyards, and some of the outbuildings until July, 1889. From October 11, 1888, the incoming tenants who succeeded Paul paid the rent of the whole farm, and the rates and taxes assessed thereon.

On November 29, 1888, Paul served upon the applicants a notice, under s. 7 of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), of his intention to claim compensation for unexhausted improvements.

The applicants disputed this claim, and accepted the notice under protest.

On March 29, 1889, Paul served upon the applicants a notice under s. 9, sub-s. 6, of the Act, that he had appointed a referee to determine the amount of compensation due to him, and requiring them to appoint a referee on their behalf, and the applicants having failed within fourteen days to appoint a referee he applied to the county court under s. 9, sub-s. 6, to appoint one for them.

The county court judge held that Paul had not quitted his holding of the farm at the time he served upon the applicants notice of his intention to claim compensation, and that such notice was duly given under the Act. The judge accordingly made an order appointing a referee for the applicants, who thereupon made this motion in the Queen's Bench Division for a writ of prohibition, on the ground that the county court judge had no jurisdiction to make the order.

Macaskie, (*Edwards*, with him), for the applicants. The words "determination of the tenancy" in s. 7 of the Agricultural Holdings Act, 1883 (1), mean the substantial determination of the tenancy. Otherwise there would be two tenants at the same time—the outgoing and incoming tenant. Here the tenancy substantially determined when the tenant gave up the 1000 acres on October 11, 1888.

(1) 46 & 47 Vict. c. 61, s. 7. "A tenant claiming compensation under this Act shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim.

"Where a tenant gives such notice, the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or any breach of covenant or other agreement."

[LORD COLERIDGE, C.J. If your construction be correct the landlord with respect to the 200 acres would be absolutely outside the Act, so far as regards his right to compensation for waste or breaches of agreement committed after the notice to quit expired.]

There is just as much difficulty in adopting the opposite construction, because the landlord cannot settle what the rent of the incoming tenant is to be until he knows the compensation which he has himself to pay to the outgoing tenant. At any rate, as to the 1000 acres, the tenancy came to an end on October 11, 1888, and the tenant's notice that he intended to claim compensation in respect of that portion of the land should have been given two months at least before that date.

[He referred to *Doe* v. *Watkins*. (1)]

Blake Odgers, for J. D. Paul, was not heard.

LORD COLERIDGE, C.J. I am of opinion that this application for a writ of prohibition should be refused. The case is one arising between landlord and tenant under s. 7 of the Agricultural Holdings Act, 1883. The tenant occupied a large farm in Dorsetshire under a written agreement which provided for a tenancy from year to year commencing on October 11, 1887, and terminable by six months' notice to quit given by either party. It seems that in the county of Dorset a custom prevails, which is quite as much in favour of the landlord as of the tenant, that the tenant shall get the benefit of his having farmed well in the last year of his tenancy by being allowed to hold over certain land and buildings after the technical determination of the tenancy. In the present case the tenant gave six months' notice to quit, which period expired on October 11, 1888. He did quit and deliver up possession of about 1000 acres, but, in accordance with the custom I have mentioned, he held over about 200 acres until the following February, and the rickyards and some of the outbuildings until the following July. The custom of the country is incorporated in all contracts made with respect to the tenancy of agricultural land in the area over which the custom applies, and it is recognised by everybody who enters into such

(1) 7 East, 551.

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contracts. The tenant in the present case had, in respect of some portion of the farm, a substantial claim for unexhausted improvements under s. 7, and he gave the notice required by the Act in November, 1888—that notice being in time to bind the landlord under the Act, if the words "determination of the tenancy" in s. 7 include the period during which the tenant held over under the custom. The landlords having refused to appoint a referee on their behalf, the tenant applied to the county court judge, under the provisions of the statute, to appoint one for them. The judge did so, and the application now before us is to prohibit further proceedings upon the judge's order. It it conceded that he had no jurisdiction to make that order if the notice of the tenant's intention to claim compensation was not given "two months at least before the determination of the tenancy," as provided by s. 7. The question we have to decide, therefore, is, what is the true and fair meaning of those words?

Now the Agricultural Holdings Act was passed with full notice in a House of Commons containing a large number of landlords. It was well known that these customs existed all over the country—customs by virtue of which the termination of the tenancy might be postponed for a period after the expiration of notices to quit—and in the face of that knowledge you find the words "determination of the tenancy" in s. 7. The same section goes on to provide that where a landlord has a claim against the tenant for waste or breach of covenant or agreement, he may, "before the termination of the tenancy, or within fourteen days thereafter," give a counter-notice to the tenant of his intention to make that claim. I entertain no doubt that the words "determination of the tenancy" there mean the end of the tenant's holding, and not the time at which by the terms of the contract between the landlord and tenant the tenancy is expressed to come to an end. That, I think, is the fair construction of the clause, because if the words, "determination of the tenancy," meant the time specified in the contract for the tenancy to determine, the landlord could not claim against the tenant in respect of waste or breach of covenant or agreement committed whilst the tenant was holding over part of the farm under the custom of the country. The landlord's counter-notice must be given before

the determination of the tenancy or within fourteen days thereafter. He would, if the applicants' contention be upheld, be absolutely at the tenant's mercy as to waste or breaches of agreement in respect of the 200 acres held over until February in the present case. His rights are reserved until the tenant's holding has come to an end, and then he has fourteen days within which to give his counter-notice. The tenant, until he has had the full benefit of his contract, cannot know what to claim for unexhausted improvements. There might be cases in which he would be greatly injured were he compelled to claim in October what he might be entitled to in the following February. It is plain to my mind that the holding of the land, and the end of the holding of the land, is what is meant by the words "determination of the tenancy" as applied to both sets of claims provided for in s. 7.

I am, therefore, of opinion that the decision of the county court judge was right.

MATHEW, J. I am of the same opinion. I agree that the words "determination of the tenancy" must receive the same construction in both branches of s. 7, otherwise it would be most unjust to the landlord, who would be disabled from making any claim against the tenant for waste or breach of covenant or agreement committed after the notice to quit had expired. I think the words in both cases mean the determination of the holding, that is, the entire holding. I am of opinion that this motion should be dismissed.

Motion dismissed.

Solicitors for applicants: *Young, Jackson, & Bacon.*

Solicitors for J. D. Paul: *H. S. Clutton, for Andrews, Son, & Huxtable, Dorchester.*

W. A.

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Nov. 4;
Dec. 19.

[IN THE COURT OF APPEAL.]

SWAINE *v.* WILSON and Others.

Friendly Society—Illegal Rules—Restraint of Trade—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *ss.* 2, 3, 4, 23—*Trade Union Act Amendment Act*, 1876 (39 & 40 *Vict. c.* 22), *s.* 16.

Where the general objects of a society are legal, as in the case of a provident society the object of which is the relief of members when disabled by age or accident or when out of employment, the fact that some of its rules are illegal as being in restraint of trade does not constitute the society an illegal society, or prevent a member from recovering a sum of money payable to him under a rule of the society which is not illegal.

Rules made for the bonâ fide purpose of protecting the funds of such a society from claims, which may be avoided, are not illegal because they are incidentally to some extent in restraint of trade, provided that their provisions go no further than is reasonable and necessary for that purpose.

Appeal from the judgment of Denman, J., at the trial without a jury.

The action was brought against the defendants as officials of a society called "The Bradford Power-loom Overlookers' Friendly Society," to recover a sum of 50*l.* to which the plaintiff claimed to be entitled as a member of the society under its rules.

The facts were as follows: The 51st rule of the society provided that any free member not twelve weeks in arrears, who might by losing a limb, or having one disabled by accident or otherwise, or through blindness, be rendered permanently unable to follow his employment in any of the branches of trade mentioned in rule 41, provided such was not the result of intemperance or other improper conduct, should receive the sum of 50*l.* on the production to the committee of satisfactory medical and other testimony of such permanent disablement. The plaintiff alleged that he came within the rule as having been disabled by blindness from following his employment, and claimed payment of 50*l.* out of the funds, or, in the alternative, that the society should be wound up and his claim satisfied out of its assets. The defendants did not deny that the plaintiff was entitled to recover the amount claimed according to the terms of the 51st rule; and the only defence set up was that the plaintiff's claim

could not be maintained because the society was an illegal society, on the ground that its objects, as set forth in certain of the rules, were in restraint of trade.

The rules of the society, so far as material to the question so raised, were as follows:—Rule 1 provided that the society should consist of such persons as were well qualified to manage and following the business of power-loom overlookers at the time of their admission; but if any member should change his calling, he might remain a member so long as he conformed to the rules of the society. 2. The objects of this society are the raising of funds by entrance fees, subscriptions, fines, donations, levies, accumulated capital, and interest arising therefrom, for the following purposes, namely: the rendering assistance to members when out of employment, the superannuation of aged members, the insuring sums of money to members in case of accident, and to defray the expenses of the burial of deceased members and of members' deceased wives; and all moneys received on account of subscriptions, fines, donations, or otherwise, shall be applied towards carrying out the objects of the society according to the rules thereof. 31–35 contained provisions as to the admission of members into the society. 36–40 provided as to the payment of contributions by members. 41 provided for the payment of certain allowances to members out of employment. 42. Should any disagreeable circumstance arise between any member and his employer or manager, which would justify such member in giving notice to leave his situation, he shall inform the president of the circumstances of the case, who shall bring the same before the committee at once, and, if they consider it advisable so to do, shall give such member consent to leave his situation and claim the benefits under rule 41. Should any member leave his situation without such consent he shall not be entitled to benefit. 46. Should any member be working where there is, or likely to be, a situation vacant, or if he gives or receives notice to leave his employment, he shall give information of the same to the president, with the nature of the work carried on, within twenty-four hours from the time such notice begins or situation becomes vacant, if he reside within three miles of the town hall (if

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above three miles, forty-eight hours), or be fined two shillings and sixpence for each neglect. Any member giving notice of a situation being vacant and withholding any important information in connection with the same shall be fined two shillings and sixpence. If there be a member out of employment, or one wishful to change his situation, the president shall immediately direct one suitable for the work to apply for the situation. Should any member who is out of employment get a situation, he shall inform the president of the same within twenty-four hours, or be fined two shillings and sixpence. If a letter be posted to the president the same day containing the necessary information, it shall be considered sufficient notice of above. 47. Any member knowing of a situation being vacant and acquainting any one not belonging to the society of the same, when there are members out of employment or wishing to change, shall be fined not less than ten shillings and not more than 2*l*., as the committee may decide. The committee shall also have power to suspend such member until the fine is paid. 48. Should any member apply for a situation where there is any member of this society working, he shall first inquire of one of the said members, if there be, or is about to be, a vacancy, before he applies for work; and should he apply, after being informed by the said member that they are not in want of a man, he shall be fined for the first offence five shillings, and, if he again offends, ten shillings. 49. Should any member be requested to teach a person the trade of a power-loom overlooker, and, not being inclined to do so, he shall inform the president of the same, who shall bring the case before the committee at once, and, if they consider it advisable, shall give such member permission to decline to teach such person; and, if he shall lose his situation through such refusal, he shall be entitled to the same amount of wages he was receiving when he was discharged, until he again find employment. 66. Should any member of the society who is in a situation apply for any situation which shall be advertised, and to which the parties who advertise do not attach the name and address of the firm, he shall be fined ten shillings. Should any member lose his situation through applying for a situation so advertised, he shall be suspended from the benefits of the society

for six months. (1) The society was not registered under the Friendly Societies Acts.

The learned judge gave judgment for the plaintiff.

E. Tindal Atkinson, Q.C., and *Morton Smith*, for the defendants. The objects at which rules 42, 47, 48, 49, and 66 are aimed are in restraint of trade. They seek to regulate and fetter the conduct of workmen as between themselves and their employers, or as between themselves, and they are therefore illegal. It is true that the objects of the society, so far as it is really a benefit or provident society, are not illegal, but, if it is partly a benefit society and partly a trade union, and the funds of the society are applicable to illegal as well as to legal objects, or partly derived from illegal sources, such as fines under illegal rules, the society is altogether illegal. A portion of the objects of the society is the enforcement of certain trade rules in restraint of trade. The Trade Union Acts, 34 & 35 Vict. c. 31, and 39 & 40 Vict. c. 22, prevent the objects of trade unions being criminal and protect the property of trade unions in respect of criminal acts, but they do not render the objects of such societies legal in the sense that agreements, such as that contained in the rule upon which the plaintiff relies, can be enforced. [They cited *Hilton* v. *Eckersley* (2); *Hornby* v. *Close* (3); *Rigby* v. *Connol* (4); *Wolfe* v. *Matthews* (5); *Strick* v. *Swansea Tinplate Co.* (6).

Waugh, (*Waddy, Q.C.*, with him), for the plaintiff. If the general object of the society be not the restraint of trade, then the fact that one or two of the rules may be objectionable as being in restraint of trade, and therefore incapable of being enforced, would not render the society an illegal society, and make it impossible to enforce such rules as may be unobjectionable. In this case the general objects of the society are those of a benefit or provident society, and the object of the rules objected

(1) It was stated in argument by way of explaining this rule that it was a practice of employers to insert anonymous advertisements for the purpose of finding out and dismissing workmen not satisfied with their situations, and who might therefore be likely to leave them at a time inconvenient to their employers.

(2) 6 E. & B. 47.

(3) Law Rep. 2 Q. B. 153.

(4) 14 Ch. D. 482.

(5) 21 Ch. D. 194.

(6) 36 Ch. D. 558.

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to is to protect the funds of the society, not the restraint of trade; and, if the rules go no further than is reasonable and necessary for the protection of the funds of the society, then, although they may incidentally have a tendency to some extent to restrain trade, they are not illegal: *Farrer* v. *Close*. (1) If this society is not an illegal one at common law, and the stipulations of the rule on which the plaintiff relies are not illegal at common law, there is nothing in the Trade Union Acts to make such stipulations illegal, or to prevent the plaintiff from maintaining his action upon the rule.

E. Tindal Atkinson, Q.C., in reply. The provisions of the rules go beyond what is reasonably necessary to protect the funds of the society.

Cur. adv. vult.

1889. Dec. 19. The following judgments were delivered:—

LORD ESHER, M.R. In this case the plaintiff was a member of a society, and he sues the officers of the society for a payment which he alleges to have become due to him under the rules of the society. It is not denied that this payment was due according to the rules, but the defence set up is that this society is an illegal society, and the plaintiff, being a member of such society, cannot take advantage of any stipulation in his favour contained in the rules. It is not denied that he had fulfilled all his obligations under the rules; and under these circumstances the defence is rather a mean one, but nevertheless we must give effect to it, if it be well founded. If it were true that the society is illegal, in the sense that its object is an illegal object, and any stipulation made by the rules in favour of a member would come into operation in consequence of his assisting in the illegal object of the society, there is no doubt that such a society would be an altogether illegal thing, and the Court could not assist a member of it to enforce any such stipulation. If, for instance, a society were founded the object of which was the commission of criminal acts, and there were a stipulation in favour of members that, if they assisted the society in this object, when they became old or met with accidents, they should receive payments; the

(1) Law Rep. 4 Q. B. 602.

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Court obviously would not enforce such a stipulation. If the object of the society were illegal, though not actually criminal, the same consequences would follow. Therefore, if the object of a society were in restraint of trade, e.g., if the object were that every member should assist in establishing and carrying out such a monopoly as would be in restraint of trade and unlawful, and there were a stipulation that every member so assisting should have certain payments made to him, I apprehend that such society would be so illegal that the Court would not assist a member of it to enforce such a stipulation. The question, therefore, is whether this is such a society. It is clear, I think, that it is not. It is a friendly society, the object of which is to assist working people, who are members of it, in old age and when they are disabled and out of employment. Therefore its fundamental object is not illegal. Then it is said that some of its rules are rules which, though not having that object, will, if carried out, be in restraint of trade. The first question that arises is whether, if that be so, it makes the society an illegal society, or the only effect is that the particular rule cannot be enforced. I think, even where some of the rules of a society are in restraint of trade and as such illegal, if the general objects of the society are not illegal, the existence of those rules, though they could not be enforced, would not prevent the enforcement of rules in favour of members which are not in restraint of trade or otherwise illegal. Therefore, as the rule on which the plaintiff founds his action is not tainted with that vice, and the society is not illegal in its fundamental object, I think he can enforce that rule. This view seems to me to be in strict accordance with the principles laid down in *Collins* v. *Locke* (1) by Sir Montague Smith.

But I say further as to this society that I do not think the rules challenged are vicious as being in restraint of trade. I do not think they were intended for that purpose. They were, as it seems to me, intended to be for the purpose of preventing extravagant outlay by the society and of economising that which the society might have to do for its members; and in my opinion their provisions do not exceed what is reasonable and necessary for that object. Although, if carried into effect, they may to

(1) 4 App. Cas. 674.

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some extent be in restraint of trade, yet, that not being their object, and their provisions being only sufficient for a legal object, I do not think that we ought to extend the doctrine with regard to restraint of trade so far as to hold them illegal as being in restraint of trade. For these reasons I think the appeal should be dismissed.

LINDLEY, L.J. This is an appeal by the defendants, who are the officers of a society, from the judgment of Denman, J. The ground of the appeal is that this society is a trade union and its rules are in restraint of trade, and that the agreement on which the plaintiff has to sue is an illegal agreement, and he cannot maintain his action upon it. This defence is not under the circumstances very creditable to the society, but, if the defence is well founded, we must give effect to it. The question raised is important not only to this particular society but also to others whose rules are similar.

The first point is as to the bearing of the Trade Union Acts on societies of this kind. The result of the provisions of these Acts is by no means obvious at first sight. The Acts in question are the 34 & 35 Vict. c. 31, and the 39 & 40 Vict. c. 22. The first of those Acts gives a definition of the meaning of "trade union" as used in the Act. That definition is contained in s. 23, which however is modified by s. 16 of the later Act. The effect of the two sections is that "trade union" means any combination for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business. There is a proviso which is immaterial in the present case. Sect. 2 of the first Act provides that "the purposes of any trade union shall not by reason merely that they are in restraint of trade be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise." Sect. 3 provides that "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." That is a very general section, which if it stood alone would apply to this case. But it is followed by

s. 4, which provides that nothing in the Act is to enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of certain specified agreements, among which are "any agreement for the application of the funds of a trade union to provide benefits to members:" but then again it is enacted that nothing in the section shall be deemed to constitute even such agreements unlawful.

The practical results of these enactments when applied to this particular society are as follows. 1. The society is a trade union within the definition clause. 2. It is legal by virtue of s. 3. 3. The action brought by the plaintiff is an action brought by a member of the society for the payment to him out of its funds of a sum due to him as a member under and by virtue of the rules of the society. Such an action is brought with the object of directly enforcing an agreement for the application of the funds of the society to provide benefits to members, and the action is in fact "a legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of an agreement" of the kind mentioned in s. 4. Notwithstanding s. 3 of the Act this action therefore cannot be maintained unless it can be maintained independently of that section. The cases which have already been decided on the Act are all consistent with this view. They are *Rigby* v. *Connol* (1) where the plaintiff sought relief against expulsion; *Wolfe* v. *Matthews* (2) where an injunction was granted not directly to enforce an agreement but to restrain a misapplication of funds: *Strick* v. *Swansea Tinplate Co.* (3) where, after a winding-up order had been made, the assets were held distributable according to such rules as were legal including those made legal by s. 3.

The above observations, however, do not exhaust the case; for, although the plaintiff cannot avail himself of s. 3 of the Trade Union Act, 1871, he will be entitled to relief if the society is a legal society apart from that section. Is, then, the society a legal society? Illegality is not to be presumed; it must be established by those who rely upon it. The defendants rely on certain rules

(1) 14 Ch. D. 482. (2) 21 Ch. D. 194.

(3) 36 Ch. D. 558.

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of this society, and contend—1. that they are illegal, being in restraint of trade; and 2. that being illegal the society itself is an illegal society and cannot therefore be sued by one of its own members for money payable to him under its rules. Before dealing with this argument it is to be observed that the particular rule sought to be enforced is not even alleged to be illegal, and that the illegality relied upon is the illegality of other rules and of the objects of the society. The primary and avowed objects of the society are set out in rule 2, and are perfectly legal; but it is said that there are subordinate objects which are illegal, and which render the society itself illegal. These objects are to be found in and are sought to be attained by rules 42, 47, 48, 49 and 66, and it becomes necessary to examine each of them in turn. These rules, or some of them, impose fines, but they in no way tend to excite or encourage ill-treatment, violence or crime; and before examining them in detail it is desirable to ascertain the principles which render rules illegal simply by reason of their being in restraint of trade. The general proposition, that every society which has rules in restraint of trade is unlawful, i.e., criminal, and that its members are punishable at common law, was denied by the Court in *Reg.* v. *Stainer* (1), and cannot be supported: See also *Hilton* v. *Eckersley* (2) and *Hornby* v. *Close* (3); per Patteson, J., in *Price* v. *Green.* (4) Such societies are not necessarily indictable as nuisances or as conspiracies, and their rules although in restraint of trade are not necessarily unlawful in any criminal sense. Whether such rules can be enforced by civil legal proceedings is quite another matter, and depends mainly on the reasonableness of the rules. But, even if some rules of a society cannot be enforced, it by no means follows that other rules of the same society cannot. *Collins* v. *Locke* (5) is a clear authority to this effect, if authority be wanted for so reasonable a proposition.

No doubt if the real object of this society were unduly to fetter trade its rules might all be tainted by the vice of the object, and none of the rules might be enforceable: see *Hornby* v.

(1) Law Rep. 1 C. C. R. 230.
(2) 6 E. & B. 47, p. 58.
(3) Law Rep. 2 Q. B. 153.
(4) 16 M. & W. 346, at p. 353.
(5) 4 App. Cas. 674.

Close (1) and *Farrer* v. *Close* (2), where the Court was equally divided, and where Cockburn, C.J., and Mellor, J., relied on evidence which in their opinion shewed that the rules were used to support strikes. But it is quite impossible in this case to hold that the avowed objects of this society as set out in rule 2 are not the real objects of the society. There is no evidence here that the rules are in fact used for the purpose of supporting strikes or for any illegal purpose. We have nothing but the rules before us. If the objects of the society are themselves legal, the introduction of some objectionable rules will at most only have the effect of rendering those particular rules invalid. The other rules will not be affected by them: *Collins* v. *Locke*. (3)

I might stop here, for enough has been said to shew that illegality fails to be a defence to this action, but having regard to the importance of the case I pass to the consideration of each of the rules alleged to be invalid. The test of validity in a case like this is reasonableness with reference to the real and legitimate objects of the society: *Collins* v. *Locke*. (4) One of the main objects of this society is to provide a fund for the payment of members when out of work. Rules made for the bonâ fide purpose of protecting the funds of the society from claims which can be avoided by reasonable care and management will not be invalid on the ground that they are in restraint of trade, provided the rules are not unduly oppressive or obviously detrimental to the public. To render rules for the above purposes invalid it must be clearly shewn that they go beyond what is necessary for those purposes: see *Tallis* v. *Tallis*. (5) These observations apply to rules made bonâ fide for the purpose of protecting the funds of the society from the claims of members who are out of work by their own fault; and to rules made bonâ fide for the purpose of protecting the funds from claims which will be made if one member in work seeks to displace another who is himself in work; and to rules made bonâ fide for the purpose of enabling members out of work and on the funds to obtain work and relieve the funds.

(1) Law Rep. 2 Q. B. 153.
(2) Law Rep. 4 Q. B. 602.
(3) 4 App. Cas. 674.
(4) 4 App. Cas. 674, at p. 686.
(5) 1 E. & B. 391.

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Tried by these principles rule 42 is clearly valid. It merely prevents a member from obtaining relief from the society, if he leaves his situation when the committee think a reasonable man might properly retain it. Rule 47 is also valid, for, although it imposes a fine varying from 10*s.* to 40*s.*, its object is to relieve the funds of the society by assisting a member out of work to get a situation known to another member to be vacant. There is nothing in the rule which affects non-members, except that, when there is a member out of work or wishing to change, non-members are not to be informed by a member of the fact that there is a vacancy. This is not unreasonable, nor are the consequences to members who disobey the rule unduly oppressive. Rule 48 presents more difficulty. Its object is to prevent a member in work from being displaced by another member. But the rule is so worded as to make no distinction between cases where the funds of the society are affected and cases where they are not. If two members are in work and one is displaced by the other, a burden is thrown on the funds. But the funds of the society are not affected, if one member out of work and on the funds supplants another member in work and off the funds. There is a change of claimants on the funds, but no extra burden thrown on them. The rule applies to both classes of cases. But there is always the chance that a member who applies for a situation filled by another may create a vacancy and yet not obtain it himself, in which case there will be two claimants on the funds instead of one. Moreover there is something mean in one member trying to supplant another when there is no vacancy, and, the rule being confined to cases where there is no vacancy, it is not unreasonable and cannot be held invalid. Rule 49 is unobjectionable; it merely says that a member who declines to teach a person his trade, and who is supported by the committee in his refusal, shall be supported by the society if he loses his place. The member is at liberty to exercise his own judgment in the first instance; if he elects to teach, the rule does not apply; if he refuses without consulting the committee or contrary to their decision and he loses his place, it will be his own fault, and he will have no claim on the funds of the society (see rule 41). The rule really protects the society from claims by persons who in the opinion of

the committee unreasonably refuse to teach, and is in this respect similar to rule 42. Rule 66 is also reasonable when understood. It applies only to members in employment who apply for other situations anonymously advertised, and which may or may not be vacant. Persons answering such advertisements run serious risk of dismissal without obtaining any other situation. The rule is both a warning to members against tricky advertisements and also a protection against claims on the funds by members who unnecessarily lose their places.

The appeal therefore must be dismissed.

LOPES, L.J. I agree, and will add only a very few words. If the general object of a society were to fetter the due course of trade, all its rules would be tainted with illegality. But it appears clearly that such is not the object of this society. Therefore it is not an illegal society. It seems clearly to result from the decision in *Collins* v. *Locke* (1) that some rules of such a society as this may be enforceable while others may not be enforceable, as being in restraint of trade. The particular rule on which the plaintiff seeks to recover is not a rule in restraint of trade. Therefore, as it seems to me, he is entitled to recover the amount he claims.

With regard to the rules of the society which have been objected to, my brother Lindley has gone so fully into them that I will only say that in my opinion they are not illegal as being in restraint of trade. They do not appear to have been intended to be in restraint of trade; they appear only to contain such provisions as are calculated to afford fair protection to the interests of the society in whose favour they are made, and they are not so large as to interfere unduly with the general interests of the public. Therefore I think this appeal should be dismissed (2).

Appeal dismissed.

Solicitors for Plaintiff: *Elliott & Ash, for Robinson & Robinson.*
Solicitors for Defendants: *Jaques & Co., for G. Curry.*

(1) 4 App. Cas. 674.
(2) See *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 23 Q. B. D. 598.

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Nov. 5.

EVANS *v.* NEWPORT URBAN SANITARY AUTHORITY.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—"*Street*"—*Highway repairable by Inhabitants at large*—*Additions to ancient Highway*—*Expenses on Road*—*Liability of Frontagers.*

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, the expenses of improving any street within any urban district "not being a highway repairable by the inhabitants at large" may be recovered from the frontagers and "the same proceedings may be taken, and the same powers may be exercised, in respect of any street or road of which a part is or may be a public footpath or repairable by the inhabitants at large as fully as if the whole of such street or road was a highway not repairable by the inhabitants at large."

In proceedings under s. 150 it appeared that the street was formed by an old footpath and strips of land alongside which had been recently added to widen it. The old footpath was repairable by the inhabitants at large. The justices found that the road was in part an ancient footpath or highway, but that it had been altered, widened, and added to, and houses having been built abutting thereon it was a street within ss. 4 and 150; that the frontagers were liable to contribute to the expenses of improving it; and an order was accordingly made for the payment by the frontagers of such expenses:—

Held that, having regard to the terms of s. 150, the frontagers were chargeable with the expenses of improving the whole street and not merely such part of it as had been added to the ancient highway, and that the order was valid.

SPECIAL CASE stated by justices of the borough of Newport.

At the hearing of a complaint against the appellant for non-payment of a sum due for expenses incurred by the respondents, an urban authority, under s. 150 of the Public Health Act, 1875, on improvements to a road, the justices determined that he was liable, and the case having been argued, on October 30, 1888, in the High Court on the point whether the road was a "street" within ss. 4 and 150, the Court decided that it was such a "street," and remitted the whole case to the justices for rehearing upon the point whether the road was or was not a highway repairable by the inhabitants at large. The justices found on evidence, a summary of which was set out in the case, that the road was an ancient footpath or highway, but that it had been altered, widened, and added to, and houses having been built abutting thereon it was a street within ss. 4 and 150 of the Public Health Act, 1875, and adjudged that the frontagers were liable

to pay the amounts claimed from them. The case being argued on March 30, 1889, before a Divisional Court, was again remitted to the justices to find whether or not the whole of the road in question was a public highway, and what were the additions, alterations, and widenings in the ancient highway or footpath, and where and when and by whom the same were made. The justices found that the whole of the road in question was not a public highway; that the father of the appellant, in or near 1850, after he had begun to build his house called "The Fields," by permission of the adjoining landowner made a carriage-drive, and agreed to fence, form, and metal the whole road in question all the way down and put in a drain, which he did, and also to make a quickset hedge and bank all the way down; this he did at the western end by planting his new quickset hedge within the boundary of the old track, thereby throwing a portion of his land into the road thus made; that along the appellant's side of the road, the north side, land was added by his father to what was the ancient track for a considerable distance in order to get an entrance to his property; that land was added at both ends, and a long way towards the middle on the appellant's side, the north side, of the present road, and land was also taken from the site of the old track and included within the then new boundary of the appellant's property; that a small portion of his boundary wall was built upon the boundary of the ancient highway or footway, viz., about 300 feet, or one fourth of the whole, the total length being about 1200 feet; and that on the south side the road was widened in 1864, and on that side the boundary of the road was a hedge and a high bank, which was taken away, and a long strip of land about 160 feet was thrown in to the roadway in order to make the road broader.

The question was whether the justices under the circumstances were right in holding that the appellant was liable to pay the amount claimed from him, and in ordering him to pay the same under s. 150 of the Public Health Act, 1875.

Ram, for the appellant. The justices have found that the road was an ancient highway. It is therefore an inference of law that it was repairable by the inhabitants at large; or the Court will

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draw that inference from the evidence in the case, which shews repair by the public authorities. If the road is repairable by the inhabitants at large, s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), under which the proceedings were taken against the frontagers, does not apply.

Macmorran, for the respondents. Part of the road was repairable by the public at large. But it has been widened and altered, and the frontagers have been charged in respect of repairs to the enlarged road. By s. 150 "the same proceedings may be taken, and the same powers may be exercised in respect of any street or road of which a part is or may be a public footpath or repairable by the inhabitants at large, as fully as if the whole of such street or road was a highway not repairable by the inhabitants at large." Where therefore an old highway is widened s. 150 applies as against the frontagers: *Richards* v. *Kessick*. (1)

[He also argued that the apportionment of expenses was binding and conclusive, as it had not been disputed by written notice within three months according to s. 257, and that if there was any jurisdiction to make the apportionment it could only be disputed in the manner prescribed. It was only where there was no jurisdiction to apportion the expenses that objection could be taken before the justices: *Midland Ry. Co.* v. *Watton*. (2)]

Ram, in reply. There was no jurisdiction to make the order, and therefore the appellant was entitled to dispute his liability before the justices by shewing that the road was a highway repairable by the inhabitants at large: *Eccles* v. *Wirral Sanitary Authority*. (3)

In *Richards* v. *Kessick* (1) the frontagers were charged only with the repairs of a new strip of pavement added to an old road, whereas in the present case the respondents seek to render the frontagers liable for the expenses of the whole road. It would be a hardship if by the gift of a strip alongside an old road a landowner should lose his immunity as a frontager in respect of an ancient highway repairable by the inhabitants at large. Read with the rest of s. 150 the final clause does not

(1) 57 L. J. (M.C.) 48. (2) 17 Q. B. D. 30.
(3) 17 Q. B. D. 107.

deprive him of his rights, but provides only that he is not to be exempt from contribution to the expense of the new part because it is added to the old.

HUDDLESTON, B. The justices have, in substance, held that the frontagers are liable to pay the expenses of this road under the provisions of s. 150, and said that, having regard to the circumstances, there is now no right of objection in the appellant, because he did not avail himself of the provisions of s. 257. The facts seem to be that the road was originally an old road, and, for the convenience of adjacent proprietors and others, had been altered from time to time, and was no longer an old road but a new road, and had become a street composed partly of the old road and partly of the new road. There was evidence before the justices that the old road had been repaired by the parish, and one witness said he had repaired it for the highway board, and "a member of the highway board, who is still a waywarden, gave evidence that in February, 1867, a deputation waited upon the highway board asking for the repair of it, and after discussion the board agreed to do it, and the surveyor was ordered to repair the road, and the witness stated that he always regarded the road as a highway repairable by the ratepayers," and the minute books of the highway board confirmed that witness. We have therefore, to deal with a road constituted by the old road and by additions to it, and we have to say whether, in that state of things, jurisdiction is given to the justices to charge the repairs on the frontagers. By 38 & 39 Vict. c. 55, s. 150, "where any street within any urban district (not being a highway repairable by the inhabitants at large) is not sewered, levelled, paved, &c." the authority may do the work and take certain proceedings against frontagers for the expenses. The section relating to a street "not being a highway repairable by the inhabitants at large," there would be, so far, no jurisdiction to charge those expenses on the frontagers in this case, because it is said that this is a street repairable by the inhabitants at large. But we must look at the final clause of the section to see if it does not meet this very case. "The same proceedings," viz. under this section to charge frontagers, "may be taken, and the same

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EVANS v. NEWPORT URBAN SANITARY AUTHORITY.

Huddleston, B.

powers may be exercised, in respect of any street or road of which a part is or may be a public footpath or repairable by the inhabitants at large, as fully as if the whole of such street or road was a highway not repairable by the inhabitants at large." That is to say, when part is a public highway and repairable by the parish, and part not, the road may be dealt with just as if it was *not* repairable by the parish. That is this case, and it was so treated by the justices, who found "that the road in question was an ancient footpath or highway, but that it has been altered, widened, and added to, and houses having been built abutting thereon, it is a new street within ss. 4 and 150 of the Public Health Act, 1875." It seems to me clear that the justices were right in making the order. The other question suggested, and which appears in the case, it is unnecessary to decide.

STEPHEN, J. I entirely agree. I think that the last clause in s. 150 clearly authorized the justices in making the order which they have made. With respect to the other point I feel more difficulty, but it is not necessary to decide it.

Judgment for respondents.

Solicitors for appellant: *Gibbs, White, & Crocker.*
Solicitors for respondents: *Cole & Jackson.*

J. R.

JONES *v.* MARSHALL.

1889
Dec. 12.

Pawnbroker—Loan—"Special Contract"—Pawnbrokers Act, 1872 (35 & 36 *Vict.* c. 93), *ss.* 10, 22, 24, *Sched.* 3, *Form* 7—*Liability to repay Balance due on Loan after Sale of Pledge.*

A special contract pawn ticket given under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 24, in Form 7, of Sched. 3, on a loan does not exclude the common law right of the pawnbroker to recover the balance due to him after sale of the pledge for less than the amount of the debt.

APPEAL from Liverpool County Court.

In an action brought by the plaintiff, a pawnbroker, to recover the balance of a loan made upon the security of a watch pawned with him by an agent of the defendant which had been sold under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), it appeared that the plaintiff had lent 8*l.* upon the watch, handing to the pawner the following pawn-ticket:

"Special contract under Act of Parliament. No. —— Pawned with Isaac Jones, Pawnbroker, 181 West Derby Road, Liverpool, this 1st day of August, 1888, by John Brooks, of Brick Road, for the sum of 8*l.*, gold lever watch, 1910, Greenwood. Terms of special contract. The pawnbroker charges for this ticket 1*s.* Profit at the rate per calendar month of 3*s.* 4*d.* After the first calendar month any time not exceeding fourteen days will be charged as half a month, and any time exceeding fourteen days, and not more than one month, will be charged as one month. The charge for storage of this pledge per calendar month, or any part of a month, in addition to the charge above-mentioned will be —— Total charge monthly 3*s.* 4*d.* This pledge is pawned for the period of three months. After the expiration of that time the pledge may be sold by auction by the pawnbroker. But it may be redeemed by the pawner at any time before the day of sale. Within three years after sale the pawner may inspect the account of the sale in the pawnbroker's books on payment of 2*s.* 6*d.*, and receive any surplus produced by the sale. But deficit on sale of one pledge may be set off by the pawnbroker against surplus on another.

"If the pledge is destroyed or damaged by fire, the pawn-

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broker will be bound to pay the value of the pledge after deducting the amount of the loan and profit, such value to be the amount of the loan and profit and 25 per cent. on the amount of the loan, unless otherwise agreed upon by the pawner and pawnbroker. If this ticket is lost or mislaid, the pawner should at once apply to the pawnbroker for a form of declaration to be made before a magistrate, or the pawnbroker will be bound to deliver the pledge to any person who produces this ticket to him and claims to redeem the same."

This ticket was signed by the pawnbroker and delivered to the pawner, who signed the counterfoil kept by the pawnbroker. After the expiration of the three months, the plaintiff called upon the defendant to redeem the pledge, but he refused, and it was sold on February 11, 1889, by auction for 5*l.* 5*s.*, the expenses of the sale being 5*s.* 6*d.*, and the interest on the loan was 1*l.* 3*s.*

The county court judge held that the ticket was a special contract excluding any liability for the balance of the loan, and therefore entered a nonsuit.

Finlay, Q.C., and *Bonsey*, for the plaintiff. At common law a loan on a pledge creates a debt which may be recovered by action, and the right to sue for it is not taken away by the fact that security is given. So in the case of a mortgage by deed containing no covenant to repay the sum advanced, an action on simple contract for the amount will lie: *Yates* v. *Aston* (1).

The special contract which is made under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 24, and in the form prescribed in Sched. 3, contains nothing inconsistent with the liability of the borrower to repay the loan. The provisions of s. 22 for setting off the deficit on the sale of one article against the surplus on the sale of another, and that the pawnbroker shall be liable to pay the balance only after such set-off, were inserted to meet the decision upon the former Act, 39 & 40 Geo. 3, c. 99, in *Dobree* v. *Norcliffe* (2), that a pawnbroker who has received several articles in pledge from one owner, and who loses on the sale of some of the articles, cannot retain the surplus arising from the sale of another article to set off against such losses, but must

(1) 4 Q. B. 182. (2) 23 L. T. 552.

pay over the surplus in each case. Sect. 22 recognises his right to payment of the balance of a loan due after sale of the security.

O'Feely, for the defendant. First, the right to sue for the balance is abrogated by the Pawnbrokers Act, 1872. Sect. 10 refers to cases "where a special contract respecting the terms of the loan" is made. Sect. 24 provides for "special contracts," and the form states the "terms of the special contract" meaning "all the terms." Such a contract was made in the present case, and contains all the terms agreed upon. Secondly, apart from the Act, there is an express written contract, and terms cannot be implied.

LORD COLERIDGE, C.J. I think it is clear that under the contract, read without reference to the Act, the pawnbroker would have a right to recover the balance of the loan unsatisfied on the sale of the pledge. It is a contract of pledge, and if the article pawned does not realize the amount lent on it he may bring an action for the deficit. But I agree that the contract is to be read with reference to the Act. Does that Act make a difference? I think not. There is nothing which excludes the common law right of the pawnbroker to recover whatever sum he may have advanced beyond the value of the pledge. Therefore on both grounds I think that the learned judge was wrong.

MATHEW, J. I am of the same opinion. Sect. 22 seems to shew conclusively the intention of the legislature, because it contemplates the right of the pawnbroker to be paid for any deficit, and indicates a fund out of which he may be paid, viz., a surplus arising from any other pledge. There is nothing to prevent him from resorting to the ordinary right at common law in the event of his debt being unsatisfied.

Appeal allowed.

Solicitors for plaintiff: *J. & C. Attenborough.*
Solicitors for defendant: *Levy & Robinson.*

J. R.

1889
Nov. 7.

USHER *v.* MARTIN.
HALL, CLAIMANT.

Practice—Interpleader—Goods taken in Execution—Bill of Sale—Prior Mortgage—Title of Grantee of Bill of Sale as against Execution Creditor.

A mortgagor of a house with the trade fixtures subsequently granted to the claimant a bill of sale of the chattels, including the trade fixtures, upon the premises. The trade fixtures and other chattels were taken in execution under a judgment against the mortgagor. In an interpleader issue between the claimant and the execution creditor:—

Held, that the claimant having become possessed of the equity of redemption in the goods under the bill of sale was entitled to them as against the execution creditor.

Richards v. *Jenkins* (18 Q. B. D. 451) distinguished.

APPEAL from the decision of the judge of the county court of Glamorganshire, holden at Swansea, on an interpleader issue.

The facts were as follows:—

The defendant, a married woman, was the proprietor of an hotel, and on March 2, 1887, she executed a mortgage of the premises including certain trade fixtures to one McCulloch to secure an advance of 100*l.*; on the following day she executed a second mortgage to Hall, the claimant, to secure 100*l.* and further advances. On September 15, 1887, the claimant obtained judgment by default in an action against the defendant for goods supplied, and on September 17, 1887, the defendant granted to the claimant a bill of sale over certain goods and chattels on the premises, including the greater part of the trade fixtures that had previously been assigned to McCulloch by the mortgage of March 2.

The plaintiffs, the execution creditors, having subsequently recovered a judgment against the defendant, the goods included in the bill of sale were, while in her possession, taken in execution under a fieri facias issued upon such judgment; and the claimant having claimed them, an interpleader issue was directed in the county court. The county court judge gave judgment for the claimant, and the plaintiffs appealed.

Glascodine, for the plaintiffs. The grantee of the bill of sale has no title to these goods. The onus is not upon the execution

creditors to shew that they are entitled to seize the goods under their judgment, but upon the claimant to shew that he is entitled to possession. These goods had passed to McCulloch under his mortgage, and the claimant is really claiming them by setting up McCulloch's title; but he cannot set up the jus tertii against the execution creditors; *Richards* v. *Jenkins*. (1) At the time of the seizure the claimant had no interest, either at law or in equity, in the goods.

Meager, for the claimant, was not called upon to argue.

MATHEW, J. The point raised, whether the claimant could maintain any title to the goods, is one of some nicety by reason of the decision in *Richards* v. *Jenkins*. (1) The object of the issue is to determine the right to the goods as between the sheriff and the claimant, and if the claimant does not make out his title to all the goods as against the sheriff, the issue must be found in favour of the execution creditor. It is said that in the present case some of the goods comprised in the bill of sale and seized by the sheriff had been previously assigned to McCulloch, and that as the claimant was not entitled to set up McCulloch's title he could not be entitled to those goods. It is possible, however, to distinguish *Richards* v. *Jenkins* (1) so as to prevent the application to the present case of the principle there laid down. When the execution was levied this bill of sale had been made, and at the time the bill of sale to the claimant was made, the debtor had the equity of redemption in these goods; under that bill of sale this equity of redemption passed to the claimant, who was entitled to say to the sheriff, "You cannot sell either as against McCulloch or against me; I have all the property in the goods that McCulloch has not." In *Richards* v. *Jenkins* (1), on the other hand, it will be seen that the claimant had absolutely no title whatever to the goods. This is sufficient to distinguish the two cases.

WILLS, J. I am of the same opinion. As to the question whether within the principle of the decision in *Richards* v. *Jenkins* (1), we are bound to hold that the claimant must fail as against the execution creditors, I desire to say that I follow un-

(1) 18 Q. B. D. 451

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Wills, J.

reservedly the law laid down by the Court of Appeal in that case. But here the facts are essentially different, and the present case is not covered by hostile authority. In *Richards* v. *Jenkins* (1) the execution debtor had no interest at all in the goods, he had nothing to part with, and as a fact the goods belonged to a third person; it was merely the common case of a person without any title to the goods setting up the jus tertii in order to defeat the title of another claimant. In the present case the execution debtor had the equity of redemption subsisting in him after the first mortgage, which equity of redemption he assigned to the claimant by this bill of sale before the goods were seized in execution. It seems to me that the claimant was entitled to say that whatever interest in the goods could be seized belonged to him and not to the execution creditors. I think, therefore, that although the reasoning in *Richards* v. *Jenkins* (1) is sound, it is inapplicable to the facts of the present case.

Appeal dismissed. (2)

Solicitors for execution creditors: *Riddell, Vaizey & Co., for W. Robinson Smith & Son, Swansea.*

Solicitor for claimant: *Richard White, for J. R. Richards, Swansea.*

(1) 18 Q. B. D. 451.

(2) Other points, to which it is unnecessary to allude in this report, were taken on behalf of the plaintiffs, and the case was eventually sent back for re-trial upon the question whether the judgment of September 15 was fraudulently obtained.

W. J. B.

[IN THE COURT OF APPEAL.]

1890
Jan. 23.

ROBINSON *v.* JENKINS AND ANOTHER. BEBRO CLAIMANT.

Practice—Interpleader—Shares—Certificate and Transfer—Chose in action—Order LVII., *rr.* 1, 2.

The plaintiff was registered proprietor of shares in a public company, and held a certificate that he was registered as owner of the shares. He executed a transfer to the defendants, who were brokers, to enable them to sell the shares, and handed to them the certificate and transfer for that purpose. The claimant gave the defendants notice that he claimed the shares, and the plaintiff demanded back the certificate and transfer. The defendants applied for an interpleader order:—

Held (affirming the judgment of the Queen's Bench Division), that, as the claimant was in effect claiming the documents, the defendants were entitled to interplead.

Semble, that a chose in action may be the subject of interpleader.

APPEAL from an order at chambers refusing the defendants leave to interplead.

The plaintiff claimed to be owner and registered proprietor of 1000 shares in the Great Sheba Gold Mine, Limited, and that he employed the defendants, who were stockbrokers, to sell the shares for him, and for that purpose intrusted to them the certificate that he was registered owner, and a transfer of the shares from himself to the defendants. He alleged that he rescinded the employment but that the defendants did not return the documents, and he claimed a declaration against them that he was owner of the shares, a return of the certificate and transfer, and damages for their detention and for breach of agreement. The defendants applied for an interpleader order on the ground that they claimed no interest in the shares, but that the same were claimed from them by one Bebro, and that they expected to be sued by him for recovery of the shares.

On appeal from an order of a master refusing the interpleader, the matter was referred by a judge at chambers to the Court.

Nov. 25, 1889. *Henn Collins, Q.C.* (*Loehnis*, with him), for the defendants.

T. Willes Chitty, for the plaintiff.

Forbes Lankester, for the claimant.

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THE COURT (Lord Coleridge, C.J., and Mathew, J.), considered that there was a substantial claim to the shares by two persons; the indicia of title were in the hands of the defendants, who made no claim to them; under these circumstances, Order LVII., r. 1 (1) applied, and an order must be made to stay the action pending the trial of an interpleader issue between the plaintiff and the claimant, in which issue the claimant was to be the plaintiff.

The plaintiff appealed.

Jan. 23. *T. Willes Chitty*, in support of the appeal. The case does not fall within Order LVII., r. 1 (a). The claim of the plaintiff is for the return of the certificate and transfer, to which Bebro has no claim, even though he should turn out to be the rightful owner of the shares represented by them. Bebro claims the actual shares, and his real claim is against the company to have his name placed on the register as owner of the shares: *Barton* v. *London and North Western Ry. Co.* (2) It is true that shares are choses in action, but they are not chattels within the meaning of the interpleader order, for the applicant cannot comply with the provisions of Order LVII., r. 2, by paying or transferring them into court or disposing of them as a Court or a judge may direct. Further, shares are not tangible property. In *Walter* v. *Nicholson* (3), which decided that the Interpleader Act did not apply to actions for unliquidated damages, John Williams, J., expressly said that the Act applied only to property which was in its nature distinct and tangible, and the words of the old Interpleader Act are larger than those of Order LVII.

(1) Order LVII., r. 1: Relief by way of interpleader may be granted:

(a) Where the person seeking relief (in this order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this order called the claimants) making adverse claims thereto.

2. The applicant must satisfy the Court or a judge by affidavit or otherwise—

(a) That the applicant claims no interest in the subject-matter in dispute, other than for charges or costs; and

(b) That the applicant does not collude with any of the claimants, and

(c) That the applicant is willing to pay or transfer the subject-matter into Court or to dispose of it as the Court or a judge may direct.

(2) 24 Q. B. D. 77.

(3) 6 Dowl. 517.

Even if Bebro were to succeed in the interpleader, the defendants would have no answer to this action, for having received these documents from their principal with specific directions regarding them they cannot set up the jus tertii; and interpleader proceedings will not be allowed where the real question in the action cannot be tried, nor will the Court deprive the plaintiff of his right to rely on the doctrine of estoppel as against the defendants: *Baker* v. *Bank of Australasia* (1); *Dalton* v. *Midland Ry. Co.* (2)

Henn Collins, Q.C. (*Loehnis*, with him), contrà. The order is wide enough to cover the case of a chose in action. Two persons are claiming the same shares in which the defendants have no interest and they are entitled to interplead. The certificate which the defendants hold is by s. 31 of the Companies Act, 1862, primâ facie evidence of title to the shares, so that Bebro, if he is really owner of the shares, would be entitled to have the certificate and transfer given up to him, so that his title may not be prejudiced by them. The question of the right to set up the jus tertii in interpleader was before the Court in *Best* v. *Hayes* (3) and *Tanner* v. *European Bank* (4), and decided in favour of the right to interplead: *Attenborough* v. *St. Katherine's Dock Co.* (5) supports this view.

T. Willes Chitty, in reply. The applicant must satisfy the Court that there is jurisdiction to make the order, and that relief can be granted in such a form as to do justice between the parties. The two documents are evidence of the plaintiff's claim against the company, and are not connected with any claim of Bebro. Further, Bebro can have no action against the defendants for the shares, for no shares are in their possession.

Forbes Lankester, for the claimant.

LORD ESHER, M.R. In this case the defendants have possession of something in respect of which the plaintiff has brought an action, and in respect of that same thing they have been threatened with an action by Bebro. Thereupon the de-

(1) 1 C. B. (N.S.) 515.
(2) 12 C. B. 458.
(3) 1 H. & C. 718; 32 L. J. (Ex.) 129.
(4) Law Rep. 1 Ex. 261.
(5) 3 C. P. D. 450.

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Lord Esher, M.R.

fendants say that they have no interest in the subject-matter of the dispute, and ask the Court to make an interpleader order. The Queen's Bench Division made an order accordingly, and, before the issue was drawn up, the plaintiff comes here by way of appeal, the only ground therefore of his appeal must be that the Court had no power to make the order.

The first point made in support of this was that the question between the claimants would be as to the right to the shares, and that such a matter is not the subject of interpleader. It is said that though the shares are choses in action, they are not tangible chattels and so are not within Order LVII. This objection reads into the order the word "tangible." Why should we do that? I, for one, do not see why we should, and I think this ground of objection is bad. Then it is said that there cannot be an interpleader order to relieve the defendants because, even supposing that the certificate and transfer represent the shares, and so the defendants have possession of all the documents of title to the shares, possession was given to them under a contract by which they are bound to give the documents back to the plaintiff. That at one time appeared to me a formidable objection, because in this action it is plain that the defendants could not set up the jus tertii. Although that cannot be done in an action, that does not determine the question whether there may not be an interpleader in such a case where an adverse claim is set up. That question seems to be determined by the cases that have been cited. In *Best* v. *Hayes* (1), and *Tanner* v. *European Bank* (2), the point was expressly raised and decided favourably to the issue of the interpleader. If those cases had stood alone, desirous as I am to keep the power of the Courts to prevent useless litigation as wide as possible, I should have willingly followed them. In addition, however, to those cases, we have the rules, made after they were decided, and the decision of the Court of Appeal in *Attenborough* v. *St. Katherine's Dock Co.* (3), from which it seems clear that this Court considered that the two cases I have mentioned were rightly decided. I think, therefore, this point fails, and that the ground of the appeal,

(1) 1 H. & C. 718; 32 L. J. (Ex.) 129. (2) Law Rep. 1 Ex. 261.
(3) 3 C. P. D. 450.

which was want of jurisdiction, is not made out. But then it is said that a just order cannot be made. If this means that an order cannot be made without interfering with the rights of the plaintiff, that objection is met by the cases I have noticed, but if it means that, apart from this, no just order can be made, I do not agree. The issues to be tried are required to inform the mind of the judge as to the truth of the disputed facts, so that he may determine the rights of the parties, and I see no difficulty in this case in having an order drawn up which will accomplish this. I think therefore the appeal should be dismissed.

FRY, L.J. The circumstances of this case are such as to create some difficulty. The shares, which are undoubtedly the main matter in controversy, are choses in action, and are registered in the name of the plaintiff, and he has power and disposition over them. The certificate, which is primâ facie evidence of title to the shares under the Companies Act, 1862, and the transfer are both in the hands of the defendants, who received them as agents for the plaintiff. In that position of things Bebro gave the defendants notice that he claimed the shares, and they applied for an interpleader, which they obtained. I think the order so made was right. In the first place, the argument that there can be no interpleader in respect of choses in action is untenable because the first rule of Order LVII. gives relief not only in respect of any debt, money, or goods, but also in respect of chattels. This is one of the widest words known to the law in its relation to personal property. Then rule 2 (*c*) provides that the applicant must satisfy the Court or a judge that he is willing to pay or transfer the subject-matter into Court or to dispose of it as the Court or a judge may direct. The disposition of a chose in action is equivalent to payment in the case of money or transfer in the case of goods or of a chattel to which that process is applicable. As to the next point, that Bebro claims only the shares and not the certificate, and that there is therefore nothing in common between his claim and that of the plaintiff, it seems to me that in claiming the shares Bebro claims everything which is necessary for the enjoyment of the property, and that therefore in substance the claim is for the certificate.

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FRY, L.J.

During the argument I experienced a difficulty as to the defendants, who are agents, setting up the rights of a third person against their principal, but that difficulty has been anticipated and set at rest in *Tanner* v. *European Bank.* (1) We were pressed in argument with the fact that the principal matter involved is a chose in action, but the answer to any difficulty in that respect is, that the defendants may claim an interpleader as to the certificate and the transfer in the possession of the defendants. The right to these documents may involve the question of the right to the shares, but I see no difficulty, when once it is settled that an interpleader should be allowed as to the documents, in settling the issues to be determined.

Appeal dismissed. (2)

Solicitors for plaintiff: *Smiles, Binyon, & Ollard, for J. H. Cooper, Manchester.*

Solicitors for defendant: *Rowcliffes, Rawle, & Co., for W. A. Jones, Manchester.*

Solicitors for claimant: *Collis & Mallam, for Cobbett & Co., Manchester.*

(1) Law Rep. 1 Ex. 261.

(2) The interpleader issue in *Bebro* v. *Robinson* was as follows:—"Whereas the above-named Marcus Bebro affirms, and the above-named William James Robinson denies that certain shares, being Nos. 79,951 to 80,950 in a company called the Great Sheba Mining Company, Limited, and a share certificate relating to the said shares and a transfer of the said shares (which said certificate and transfer were deposited in Court pursuant to the above-mentioned order, dated the 25th day of November, 1889) are the property of the said Marcus Bebro as against the said William James Robinson. And it has been ordered by the said order of the Queen's Bench Division of the High Court of Justice, dated, &c., that the said question shall be tried in London. Therefore let the same be tried accordingly."

A. M.

PROUT *v.* GREGORY. SHARP, GARNISHEE. 1889 Dec. 6.

Practice—Attachment of Debts—Administration in Bankruptcy of Estate of Person dying Insolvent—Dividend payable by Official Receiver—"Debt" liable to be attached—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 58, 62, 125—*Order* XLV., *r.* 1.

A dividend payable under the administration in bankruptcy of the estate of a person dying insolvent to a creditor of the estate is not a debt liable to be attached within the meaning of Order XLV., r. 1.

APPEAL from the order of a master discharging a garnishee order nisi, referred by a judge at chambers to the Court.

By s. 125 of the Bankruptcy Act, 1883, provisions are made for the administration in bankruptcy of the estates of persons dying insolvent; and by sub-s. 5 it is enacted that, upon an order for administration being made, the property of the debtor shall vest in the official receiver of the Court as trustee thereof, and that he shall forthwith proceed to realise and distribute it in accordance with the provisions of the Act; and by sub-s. 6 the provisions of Part III. of the Act relating to the administration of the property of a bankrupt are, with certain modifications, to apply to the case of an administration order under the section in like manner as to an order of adjudication. By s. 58 the trustee is to declare and distribute dividends amongst the creditors who have proved their debts.

It was admitted that the defendant, who was a judgment debtor of the plaintiff, was a creditor in the administration of the estate of a deceased insolvent, and that the sum sought to be attached was payable to him as a dividend in the administration. The garnishee was the official receiver of the Birmingham district, in whom the estate was vested as trustee under s. 125.

Percy Gye, for the plaintiff. The provision of the Bankruptcy Act, 1883, that these dividends are to be distributable among the creditors who have proved must be taken to be subject to the power of the Court to make a garnishee order in favour of a judgment creditor of a person entitled to receive a dividend under the administration. The dividend is a debt payable to

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the creditor who has proved, and is a debt liable to be attached within the meaning of the garnishee order.

Muir Mackenzie, for the official receiver, was not heard.

LORD COLERIDGE, C.J. This appeal must be dismissed. To make a garnishee order in such a case as the present would be to interfere with the administration of an estate which has to be administered under the provisions of a statute expressly dealing with this subject-matter, and containing express directions as to the manner in which the subject-matter is to be dealt with.

MATHEW, J. I am entirely of the same opinion. It is quite impossible to treat this as a debt, or to say that the official receiver is a debtor; he is responsible to the Court for the due performance of his duties, but is not a debtor of the persons entitled to receive dividends from the estate. The point is not wholly destitute of authority, for a somewhat similar question arose in *Dolphin* v. *Layton* (1), where it was held that money in the hands of the registrar of a county court as an officer of the court was not subject to process of attachment.

Appeal dismissed.

Solicitors for plaintiff: *J. & C. Robinson & Wilkins, for Goodger, Burton-on-Trent.*

Solicitor for the official receiver: *Solicitor to the Board of Trade.*

W. J. B.

(1) 4 C. P. D. 130.

[IN THE COURT OF APPEAL.]

1890
Jan. 24, 27.

THE QUEEN *v.* BARNARDO.
GOSSAGE'S CASE.

Habeas corpus—Issue of Writ against Person who has no longer Custody of Person detained—Illegal handing over of Person detained—Evasion of Process—Impossibility of obeying Writ.

On an application by the parent for a writ of habeas corpus in respect of a child, directed to the head of an institution for destitute children, in which the child had been placed, it appeared that before the proceedings commenced he had, without authority from the parent, handed over the child to another person to be taken to Canada, and that he did not know the address of such person or where he or the child was:—

Held, that the writ should issue:

By Lord Esher, M.R., on the ground that, although it might be that the writ ought not to issue, if it were shewn to be absolutely impossible to produce the child, the facts of the case did not shew such impossibility, and the person against whom the application was made, having illegally parted with the custody of the child, still continued responsible for its production:

By Fry, L.J., on the ground that, although the general scope of the writ of habeas corpus is to compel production of a person detained by a person in whose custody he is detained, and the writ ought not to issue where it appears to be impossible that it should be obeyed, yet it ought to issue where the circumstances lead to the conclusion that the person against whom the application for the writ is made has handed over the custody of the person detained for the purpose of evading the process of the Court, and that, if the writ be issued against him, the person detained may be produced; and that the circumstances of the case did point to such conclusion.

Reg. v. *Barnardo* (23 Q. B. D. 305) discussed.

APPEAL from the order of the Queen's Bench Division (Lord Coleridge, C.J., and Bowen, L.J.), making absolute a rule nisi for a writ of habeas corpus directing Dr. Barnardo to bring up the body of Harry Gossage within three months.

The facts, so far as material to this report, were as follows. The appellant, Dr. Barnardo, was the founder and manager under a committee of certain institutions known as Dr. Barnardo's Homes for Destitute Children. A boy of about twelve years of age, named Harry Gossage, whose father was dead, had been given by his mother, who resided at Leamington, into the possession of an organ-grinder, who starved and ill-treated him and ultimately left him destitute in the streets of Folkestone. A clergyman at

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that place wrote to the appellant in September, 1888, asking him to receive the boy into one of his homes. The appellant accordingly did so, and a letter was sent from the Home to the boy's mother, stating that he was in the Home, and asking whether she was willing that he should remain there. To this she sent a reply, dated September 29, to the effect that she was willing that the boy should remain in the appellant's Home, that his father was dead, and two of his brothers were in Canada, and that she could not afford to keep him herself. A form of agreement usually employed in such cases was afterwards sent from the Home to the boy's mother to sign, which gave the appellant authority, among other things, to place the child in one of the colonies. The mother, however, did not sign or return such agreement. It appeared from the appellant's affidavits that on November 10, 1888, a Mr. Norton called upon the appellant at the Home with letters of introduction and recommendation purporting to be from persons in Canada, and stated in substance that he wished to adopt and take to Canada with him a boy of about ten or eleven years of age. Five boys were shewn to him, among them being the boy Gossage, whom he selected. The appellant's affidavit stated that he was satisfied as to Mr. Norton's respectability, and that his proposal would be for the boy's benefit, and accordingly he arranged that Mr. Norton should fetch the boy away on November 16. The appellant's affidavits further stated that Mr. Norton expressed himself as being very anxious that there should be no interference with the child on the part of the child's relatives; that in other cases of the kind arrangements for adoption of children from the Home by persons in Canada often had to be broken off owing to the persistent annoyance of relatives of an impecunious condition or vicious character; that he believed from what the boy Gossage had told him, and from facts that had come under his knowledge from other sources concerning the mother, that she was indifferent as to what became of the child; that he saw in Mr. Norton's offer a prospect of placing the boy where he could not again be injured by his mother's unkindness or indifference; and that these considerations made him acquiesce in the view expressed by Mr. Norton that the latter should not give his address in Canada. Mr. Norton

came again to the Home on November 16, when the boy was handed over to him by the appellant and taken away. The appellant's affidavit stated that since November 16, when the boy was so handed over, he had had no communication with Mr. Norton or the boy, that he did not know where they respectively were, that he did not know their or either of their addresses and had no means of communicating with them or either of them, and that since that date the said Harry Gossage had not been and was not in his possession, custody, or control. It appeared that on November 11, 1888, a letter had, by the mother's wish, been written by a Mr. Newdigate, a gentleman residing at Leamington, to the appellant at the Home, stating in effect that the mother had called on him to express her desire for a Catholic home for the boy whom the appellant had kindly received, that the St. Vincent's Home, Harrow Road, was prepared to receive the boy, and that he was arranging for the boy's transfer with Mr. Douglas Hope, the head of that institution, and enclosing a subscription of ten shillings to the appellant's homes. On November 14 a reply was sent from the appellant's Home by one of the officials there, acknowledging the receipt of the subscription. On November 16, a letter was written to the appellant at the Home by Mr. Hope, stating that, in accordance with a communication received from Mr. Newdigate, he proposed sending for the boy, and asking what time of day he should send. On November 23 Mr. Newdigate wrote again to the appellant at the Home, stating that the mother had requested him to find a Catholic home for the boy, being herself a Catholic, and that he had accordingly arranged with Mr. Hope to place him in St. Vincent's Home, and returning the form of agreement sent to the mother to sign. On December 15 a reply was sent to the letter from Mr. Hope, signed "Adam Fowler, deputy-governor, Boys' Home," stating, in effect, that the appellant wished the writer to express his regret that in the first instance his own absence from town and later his continued absence from the office had prevented an earlier reply, but that he regretted that he could not, in accordance with the rules of the institution, comply with Mr. Hope's request. On December 22 Mr. Newdigate again wrote to the appellant at the Home, asking on behalf of the mother for the

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delivery of the child. On December 31 a reply was sent from the Boys' Home, signed by Mr. Odling, the secretary, stating, in substance, that the appellant wished him to say, in reply to the communication of the 22nd, that the Homes were not designed for proselytizing purposes, and that children were never admitted unless believed to be destitute or in circumstances of great necessity, in which case they were admitted irrespective of religious denomination, but that, having once admitted a case, and had the formal agreement of the institution ratified by the parent or guardian, their rules did not permit them to dismiss a child on religious grounds, and that, as they understood that the ground on which the application was made for the return of the child was that the mother desired to place him in a Roman Catholic institution, the appellant felt himself unable to comply with the request, the more so owing to the fact which had come to his knowledge that the child's father was a Protestant, and that his father, before he died, expressed his desire that the child should remain a Protestant.

In the first of the affidavits filed by the appellant in answer to proceedings for recovery of the child, he stated that, before handing over the child to Mr. Norton, he had, on November 12, received Mr. Newdigate's letter of the 11th, and that subsequently to such handing over of the child he received Mr. Hope's letter of November 16; but in a subsequent affidavit he explained his former statement in substance as follows: that for some time after November 10, 1888, he was a great deal absent from the homes through illness and pressure of other engagements, only attending at the offices of the homes for a short time on two or three occasions, among which was the interview with Mr. Norton for the purpose of handing over the child to him; that it was the practice when he was away to reserve letters which concerned matters which could only be dealt with by the appellant to be replied to by him, or in some cases partially to acknowledge them and reserve portions of them for a fuller reply by himself; and that there was consequently a great accumulation of letters to him, which had to be dealt with after his absence, and it was not until November 27 that Mr. Newdigate's letter of November 11 was seen by him, when the child had been gone from the Home a fortnight; and that he did not mean by his former affidavit that

he had personally received or even heard of the receipt of that letter before handing over the child, but only that such letter had been received at the offices of the institution, and that as a matter of fact neither that letter nor the letter from Mr. Hope was seen by him until on or after November 27, nor had he previously heard of such letters having been received, or of any application having been made for the dismissal of the child. The appellant further stated that he constantly received applications for the return of children from relatives who, when they applied, distinctly informed him that they had no personal desire to remove the children, but were compelled to demand their return through the influence of their clergy, who threatened them with grave results for non-compliance; that he saw no proof in the earlier letters of Mr. Newdigate and Mr. Hope, when they came before him, that they were written with the authority of the mother, and consequently did not reply to them. He also stated that the letter of December 15 was written during his absence from the Home by Mr. Fowler, the governor, not upon any instructions with regard to the particular case, but in pursuance of a general authorization to deal with such matters, and that when, on December 31, he caused a reply to be sent to Mr. Newdigate's further communication, he had received no further proof that he was authorized by the mother than at first, and therefore considered that he was not bound to disclose the facts of the case to an unauthorized correspondent, and it would be sufficient to refer to the general principles on which the institution acted in regard to admissions or dismissals from the homes, and, although Mr. Odling's letter was not happily expressed, the appellant certainly did not intend to mislead Mr. Newdigate into supposing that the child was then in the Home. In January, 1889, a further letter was sent to appellant, enclosing an order, signed by the mother, for the delivery up of the child, and he then replied that the child was no longer and had not for some time been in his custody or power. A rule nisi for a habeas corpus was obtained at the instance of the mother, which was afterwards made absolute as above mentioned. (1)

(1) In making the above statement of facts it has been necessary to summarize the statements contained in the affidavits, which were very lengthy,

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The appellant in person. The scope of the writ of habeas corpus is to procure the production of the body of a person alleged to be unlawfully detained by some one who detains him. Therefore, when, as in the present case, the person against whom the application for the writ is made has entirely parted with the custody of, and has no longer any power or control over the body of such person, and it is therefore impossible for him to obey the writ, then, even though he acted unlawfully in parting with such custody, the writ ought not to issue. The form of the writ states that the person is taken and detained in the defendant's custody. The writ of habeas corpus was granted by the Divisional Court under a misapprehension as to the effect of the decision in *Reg.* v. *Barnardo.* (1) That case is distinguishable. There the writ had been issued, and there was no appeal against the order for its issue, and the question was, whether the return was good. The ground of the decision in that case was that the facts relied on by way of return might have been urged in opposition to the granting of the writ, but, the writ having been granted directing the production of the child, it must be obeyed, and the fact that the possession of the child had been unlawfully parted with before the issue of the writ formed no excuse for disobedience to the writ. The question here is, whether the writ should issue. The effect of the Irish case *In re Matthews* (2) was misunderstood in the case of *Reg.* v. *Barnardo.* (1) In the Irish case the Court came to the conclusion that the child was virtually and substantially in the custody or within the control of the defendant. The complaint here is in effect that the child has been lost. The Court will not issue a writ of habeas corpus when the person alleged to be

and which it would be impossible to set out in full. A considerable conflict arose upon the affidavits with regard to many questions of fact which are not material to this report—e.g., as to the character of the mother and her conduct towards the child, it being asserted on the one side and denied on the other that they were such as to disentitle her to the control of the child; also as to the question how far the demand that the child should be given up to the Roman Catholic institution was bonâ fide that of the mother, &c., all which questions were discussed in the argument. It has been sought to confine the statement of the facts and arguments in the above report as closely as possible to that which is material for understanding the points of law with which the judgments deal.

(1) 23 Q. B. D. 305.

(2) 12 Ir. Com. L. R. 233.

detained is not in the custody or within the control of the person against whom the application for the writ is made, because they may not approve of his conduct in parting with the custody of the child. The effect of doing so would be to make the writ which is said to be remedial merely punitive. There is no authority for giving it that effect.

Forbes Lankester, (*Joseph Walton*, with him), for the respondent. The principle, upon which *Reg.* v. *Barnardo* (1) was decided, is that, where a child has been in the custody of the person against whom proceedings to compel production of such child are taken, it is no answer to such proceedings that he has illegally handed it over to somebody else, because such illegal handing over of the child does not exonerate him from the responsibility he has incurred. The contention of the appellant reduces the decision in *Reg.* v. *Barnardo* (1) to a mere technicality, viz., that the defendant should have appealed against the order for the issue of the writ, instead of returning that it was impossible to obey it; but the terms of the judgments shew that it was not really decided on any such technical ground as alleged, but on the general principle before stated. Up till comparatively recent times no such point as that upon which the suggested distinction between this case and *Reg.* v. *Barnardo* (1) turns could have arisen, because formerly the writ issued ex parte, and the question could not have arisen till the return. In recent times it has been found convenient in some cases, where all the facts were fully ascertained and the person alleged to be detained was practically before the Court, to dispose of the matter finally upon the argument of a rule nisi; but in the present case the discussion as to the ultimate possibility of the production of the child is premature. That and other matters may have to be discussed at subsequent stages of the proceedings when the question arises whether the appellant is in contempt, and if so, what consequences are to follow. According to the old practice the appellant could not have raised his present contention till the return, and then *Reg.* v. *Barnardo* (1) would apply. The same principle really applies to this case as applied to that. Facts which would not constitute a good return to the writ

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cannot constitute good reasons why it should not issue. Moreover, the facts relied on by the appellant do not shew that it will be impossible for him to recover possession of and produce the child, but only that it may be very difficult for him to do so. Having illegally parted with the possession of the child without the consent of the mother, it lies on him to prove clearly that it will be absolutely impossible to obey the writ if it issues. It is submitted that he has fallen very far short of doing this.

The appellant in reply.

LORD ESHER, M.R. In this case an application for a writ of habeas corpus has been granted by the Queen's Bench Division, and the question for us is whether it appears, upon the affidavits now before the Court, that the writ was rightly issued. The application was against the head of an institution which is of such magnitude that he cannot possibly attend to every detail of its business himself, and therefore he necessarily has deputies and agents at the institution who assist him by doing part of the work which if possible he would do himself. I mention this in order to dispose at once of a point taken by the appellant in the course of the argument which appears to me to be bad. (1) He relied on the fact that, owing to his absence from illness or other causes, matters which were known to his subordinates, and which, if he had known them himself would have made his conduct illegal, were not known to himself personally. I cannot accede to this argument. He has undertaken to do certain things with regard to the children whom he receives into these homes; and if, being unable to attend to all details himself, he entrusts a portion of the work to agents, he is as much answerable in respect of the knowledge and acts of his agents as long as their authority is not countermanded as in respect of his own knowledge and acts. Therefore, if a letter comes to the knowledge of a person whom he has left in charge during his absence, and, notwithstanding such letter, a child is sent away, it is the same thing as if he had himself been there, and after receipt of the letter had sent away the child. We must therefore consider the history of

(1) This part of the argument was not mentioned in the report of the arguments because it was not thought to involve any novel point of law.

the case on that footing. The facts of this case very well illustrate the great amount of good the appellant is doing by his homes, but also I think the way in which he is sometimes disposed to go beyond what is legal. The mother had given the custody of this child to an organ-grinder who, as might have been expected, when he found it a burthen upon him, had deserted it at Folkestone. A clergyman finding the child there and knowing of the appellant's institution induced him to receive the child. The appellant, having found out that the child had a mother living, took afterwards what was no doubt the safe course by sending to the mother to be signed by her the form of agreement which he generally uses in these cases. The mother, however, did not sign that agreement. Therefore he and those under him knew that there was no such agreement signed as had been desired. There was, however, a letter written by the mother assenting to the child's remaining in the Home. No doubt it is the prudent course for the appellant to get a specific agreement of the kind which he sent to the mother to sign, if he can, particularly where he contemplates sending a child to one of the colonies, but I say again, as I have said in a previous case, that, if he does get it signed, the effect is only to give him authority to do certain things as long as such authority remains unrevoked, and, although he may have incurred expense and taken trouble relying on such agreement, yet, if the parent chooses to retract the authority before it is acted on, the law of the land is that he or she can do so. Therefore he must take the child subject to that risk. Here, however, he had no such agreement. The mother's letter contained nothing which gave him authority to part with the custody of the child to another person residing abroad in such a way as not to be able to inform the mother where the child had gone. After he had kept the child for a time other persons intervened, actuated not, I think, by any notion that the child was not being well taken care of, but by their views with regard to its spiritual welfare. Though there could be no doubt that the child was being well taken care of, it was being brought up as a Protestant, and they objected to its not being brought up as a Roman Catholic. They therefore persuaded the mother to give them authority to demand the child from the appellant. I do not

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desire to detract from their motives; they were entitled to act upon their convictions so long as they did not act contrary to the law; and I cannot see that they exercised any influence which they were not legally entitled to use with regard to this child. These persons having persuaded the mother to require that the child should be delivered up, not to herself, but to a Roman Catholic institution, they wrote to the appellant at the Home to that effect. Here what I said at the beginning of my judgment applies. The appellant was not there at the time, but of course there must be some one there to act for the institution in his place when he is away, and accordingly his agent was there. He says in his affidavit that he did not know of the letter, but the letters were all sent to the Home and his subordinates must have known of it, though for reasons which I will presently give I do not think it is very material whether that was so or not.

The appellant contended that, inasmuch as there was no letter or communication from the mother herself, there was no obligation to take notice of what other persons wrote; but I think that a person receiving such communications as these ought not to assume without proof that they are written without the authority of the mother, and that such a person would be acting wrongly in sending the child away to a colony after receipt of them without further inquiry. It seems to me that the inference in such case would be that he foresaw the proceedings that would probably be taken and sent the child to the colonies with a view to making it difficult to get it produced upon habeas corpus. But in my opinion it really does not much signify whether this was the case or not. In any case the only authority the appellant had with regard to the child was that given him by the letter from the mother, and that letter did not authorize him to send the child to a colony, certainly not to send it away to a colony so that it could not be traced. Therefore the result is the same whichever way the case stands, and whether the appellant is made responsible in respect of knowledge on the part of his agent or not. In the one case, whatever authority the appellant originally had with regard to the child, after an intimation had been given that such authority was withdrawn or was going to

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be withdrawn, there could be no authority to send the child away. But apart from any question as to knowledge of the letter, the appellant only had authority to keep the child in his home: he knew that he had failed to procure the mother's signature to the agreement, and there never was any authority to send the child to a colony. The appellant had no legal right or authority over this child except so far as the mother gave it to him. He is not the legal guardian of the child; and he only had authority from the mother to keep the child in a particular institution for particular purposes and no other authority. Therefore he is in this predicament; though he was at one time in lawful custody of the child, before the intervention of the Court was invoked, a time came when his authority was revoked and he never had power to do what he did. Notwithstanding the absence of any authority to do so, he handed over the child to a Mr. Norton to be taken abroad to the colonies, and it appears to have been expressly made part of the arrangement that there should be no means given of tracing it. I do not desire to suggest that the appellant was not acting as he thought in the best interests of the child, or that the person to whom the child was given up was other than a respectable and proper person; and I do not wonder that a person who was undertaking to adopt a child, and who knew probably what sort of relatives such children would be likely to have, was desirous of taking such steps as would prevent the relatives in future coming forward to claim the child; but the arrangement so made was illegal; and the appellant in so parting with the possession of the child committed an illegal act. He has deliberately sent the child out of the jurisdiction in such a way that, unless the power of the Court is sufficiently strong to prevent it, he will deprive the Court of the power of ascertaining at the instance of the parent what has become of the child. What, then, is the consequence of such conduct? That question was carefully considered by this Court in the case of *Reg.* v. *Barnardo* (1), in which case almost all the arguments were brought before the Court which have been used in the present case, and reference was made to the Irish case *In re Matthews* (2); and we came, as I think, to the conclusion that, where a person

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is shewn to have once had the custody of a child, and he has parted with it to some one else wrongfully, i.e., without legal authority, so that it is true that he cannot redeliver the child at the time when its production is required, the child being then out of his possession, custody, and control, the fact that he has so parted with the possession of the child is no answer to proceedings to compel its production. It was not necessary there to determine whether, if it could be shewn that it was absolutely impossible in the nature of things that he should produce the child, as for instance if it had since died, then a writ of habeas corpus ought to go merely for the purpose of punishing him, nor is it necessary to determine that question now. I have very little hesitation, however, in saying that, if the case could be brought up to that pitch, and if it could be shewn that, however wrong the conduct of the person proceeded against had been, it had become absolutely impossible for him to produce the child, then the writ of habeas corpus ought not to go merely for the purpose of punishing a past illegality. In that case we did not think that any such absolute impossibility was made out. We intended to decide not, I think, that, if the production of the child was absolutely impossible, a writ of habeas corpus ought to go, but that, unless such absolute impossibility was clearly shewn, it was no excuse for the defendant to shew that he had illegally parted with the possession of the child under such circumstances that it would be extremely difficult or almost impossible for him to produce the child, seeing that such difficulty was the result of his own illegal act. It seems to me clear that our decision in that case proceeded upon the footing that the defendant had parted with the possession of the child before the issue of the writ; and that any wrong or illegality he had committed had been committed before that time; and that it was true to say that at the moment when the writ was applied for the child was out of the appellant's custody, power, and control. We came, however, to the conclusion that it was no answer to the writ for him to say that he could not produce the child because he had illegally parted with the custody of it and did not know where it was, and to show that it was almost impossible for him to produce the child. We thought that, having brought about that state of things by his own illegal

act, he must take the consequences: and we said that he was bound to use every effort to get the child back: that he must do much more than write letters for the purpose: that he must advertize in America, and even if necessary himself go after the child, and do everything that mortal man could do in the matter; and that the Court would only accept clear proof of an absolute impossibility by way of excuse. No such impossibility was shewn in that case, nor is it, I think, in this. Applying that decision to the present case, it seems quite clear that the result of it is that, if the writ goes in this case, and the appellant can only put forward by way of return to it what he has put forward on this appeal, such a return would be bad; and therefore that he would have to make further and fuller efforts to get back the child; and, if he did not produce the child, there would be a disobedience to the writ, and it would be necessary then to consider whether any, and if so what further consequences ought to follow. But it is argued that in *Reg.* v. *Barnardo* (1) the writ had already issued, and therefore that case is distinguishable. I confess the argument is too fine for me. It is said that the very same facts that would not constitute a good return to the writ if issued may yet be a good reason for not allowing the writ to issue. It seems to me that the result of holding that contention to be good would be to tie the hands of the Court too much. I cannot see why because certain facts constitute no return to the writ, they are reasons for not issuing it. It seems to me that this point is substantially covered by what was decided in *Reg.* v. *Barnardo.* (1) We were there applying the law to a novel combination of circumstances, and I think that we intended deliberately to adopt the principles that we supposed to have been laid down in the Irish case of *In re Matthews* (2) with regard to such a combination of circumstances. It may be said that we went further than any Court in England has before gone, but, if that be so, I think we meant to go that length and to adopt what was said in the Irish case with regard to the case where persons wrongfully withhold the possession of a child from religious motives. It was there said that, "where the Court can collect from the writ and return that the party has been in illegal custody at

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a period antecedent to the issuing of the writ, it will not rest satisfied with the stereotyped form that, at the issuing of the writ or at any time since, the party has not been in his possession, custody, or power, but will insist on the person to whom the writ is directed producing the party or shewing that he has lawfully discharged himself of such custody." It seems to me that the meaning of that must be that the fact that the person to whom the writ is to be addressed has illegally parted with the custody of the child even before the application for the writ is no reason why the writ should not issue. It does not appear to me that any sufficient reason has been shewn why the writ should not go in this case. At a future stage of the proceedings it may be necessary to discuss again a great many of the matters that have been discussed on this appeal. If the child is produced, the Court will have to consider what is to be done with the child and what will be for its benefit, and possibly the Court may desire to have an opportunity of hearing what the child says about the matter. If the child is not produced, the appellant will have to shew what efforts he has made to obey the writ, and it will be necessary to consider whether any and what steps are to be taken with regard to him. All those are matters that will have to be considered at a subsequent stage of the case. It does not follow that if the child is produced it will ultimately be given up either to the mother or the rival institution. The only question now is whether the writ is to go. I think the appellant is bound to use every effort to get the child back and produce it in order that the Court, and not he, may determine what ought to be done with it. For these reasons I think the order of the Divisional Court was right.

FRY, L.J. I shall not say much with regard to the circumstances of this case, because I agree generally with the estimate given of them by the Master of the Rolls. The child appears to have originally come into the custody of the appellant lawfully, it being then deserted by its natural guardian: and, after the receipt by him of the letter from the mother of September 29, it lawfully continued in his custody with her consent, she being the natural guardian of the child. The appellant sent to the

mother a form of agreement, which purported to authorize him to allow the child to be removed to one of the colonies, but that form of agreement was not returned to him by the mother, though it had been sent with an envelope for the purpose of being so returned. He had therefore no authority to do anything with the child except to keep it at his home. Without any authority to do so, on 16th November he made over the possession of the child to Mr. Norton. I will refer presently to the circumstances under which he so handed over the child, but, before doing so, I wish to consider the arguments that have been addressed to us with regard to the law of the case.

The appellant has argued that, when the writ was applied for, he had parted with all power over the child, and it was not in his possession, custody, or control, and, that being so, the writ could not go, even though he might have acted unlawfully in handing over the child to another person. A very similar point arose in the case of *Reg.* v. *Barnardo.* (1) The question, however, in that case was not whether the writ of habeas corpus ought to issue, but whether the return to the writ was good. Lindley, L.J., in giving judgment put the matter very briefly. He said, "As a matter of law I think it is no valid excuse for not producing a child or other person in obedience to a writ of habeas corpus to state inability to obey, if such inability is the result of the previous illegal conduct of the person to whom the writ is addressed. Here the defendant's inability arises from his having illegally sent the child abroad against the will of the lawful guardian, and that he did this before any legal proceedings against him were commenced is immaterial." It appears, therefore, to have been decided by this Court with regard to the return to the writ that the illegal act of the defendant, by which he had prevented himself from having the custody of the child at the time when the writ issued, afforded no good answer by way of return to the writ. It has been argued with much force that what does not amount to a valid return to the writ cannot be a reason why the writ should not issue. If that were the effect of the decision in *Reg.* v. *Barnardo* (1) I must say I should humbly differ from it for the following reasons. It appears to me that

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the name of the writ, the suggestion contained in it that the person to whom it is addressed has the custody of the person to be produced, the exigence of the writ which is that the body of such person be produced, the provisions of the statutes relating to the writ, that all these matters shew that the primary and principal object of the writ is to have the body of the person detained, who, it is suggested, is in the custody of the person to whom the writ is addressed, brought before the Court, and, that if that be shewn to be really impossible, the writ ought not to go. The object of the writ cannot be attained, if the fulfilment of the exigence of the writ is impossible. The writ appears to me to proceed on the hypothesis that obedience to it is possible. If it be shown to be impossible, as a general rule, I think the writ ought not to issue. Observe the consequences that would otherwise follow. The Court, by virtue of a writ intended to compel the production of the body of a person detained, would be requiring the person to whom the writ is addressed to do what the Court knows it to be impossible for him to do. I do not think that the Court is in the habit of doing such an illusory thing as to order a person to do what it knows to be impossible. For not performing that impossibility he would be in contempt. Contempt of this kind ordinarily arises where a person fails to do something which the Court has ordered him to do, and which he can do. How can a person be said to be in contempt for not doing that which, ex hypothesi, the Court knew it was impossible he should do at the time they ordered it to be done? The result of issuing the writ in such a case would be that we should be using the writ really to punish by imprisonment the person to whom it was addressed for having done some unlawful act before the writ was issued. I do not think that it would be right to use the machinery that was intended for one purpose, viz., to compel production of the person detained, for a different purpose, viz., that of punishing a person for an illegal act which was complete before the issue of the writ: and I am the more inclined to this view by the consideration that the result would be that a man might be punished for such bygone illegal act by imprisonment for an indefinite time upon affidavits and without the intervention of a jury. These considerations would make me pause before agreeing to the general

proposition, that in such cases as these the impossibility of doing what the writ directs would not, if clearly shewn, be an answer to the application for the writ or a valid return to it. It was argued that the Irish case of in *Re Matthews* (1) was an authority for the proposition. That case came before the Court on three occasions, first on the question whether the writ should issue; secondly, upon the question whether the return was good; and, thirdly, upon the question whether the contempt was purged. What occurred on the two latter occasions has nothing to do with the point now in question. But the issue of the writ in the first instance proceeded on what was termed "virtual custody" by the defendant of the child to be produced. If that means what would in law amount to custody, the case is no authority for saying that the writ should issue where there is no such custody, but, if it means something other than such legal custody, it appears to me to be a novelty in law, the nature of which I confess I do not exactly understand. If, therefore, this were a simple case of the issue of a writ against the appellant, the exigence of which I knew he could not satisfy, I could not be a party to it. But in my opinion there is another view which should be taken of this case. This child was handed over to Mr. Norton after an intimation had been sent that the mother had withdrawn her consent to its remaining in the appellant's home, and that an application would be made for the child by the head of a Roman Catholic institution. Matters to which I will further refer create in my mind a great suspicion as to the circumstances under which the child was made over. I think that, where a child has been illegally handed over shortly before the issue of the writ, under circumstances of great suspicion, and which give reason to believe that it was done for the purpose of avoiding the exigence of a writ about to be issued, an exception arises to the general principles I have mentioned. I entirely agree with what the Lord Chief Justice said on this head in the Court below. He said, referring to the argument for the appellant, "It is contrary to good sense, because a person would then only have to break the law and say, 'You cannot put the law in force against me because I have broken it'; a man would only have to take care

(1) 12 Ir. Com. L. R. 233.

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beforehand to prevent himself from being able to obey a writ, if he thought he was coming to tell the Court so, and they could not issue the writ because the person had already prevented his being able to return to it. He would be able to laugh in the face of the Court and to reduce the power and jurisdiction of the Court to almost nothing." If there be reason to believe that an illegal act has been done in order to defeat the anticipated process of the Court, and that on the issue of the writ, the person will ultimately be produced, then, in my opinion, the writ ought to go. In the present case the circumstances do, in my opinion, afford strong grounds for inferring that that is the real nature of the case. On 11th November Mr. Newdigate wrote a letter to the appellant stating in effect that the mother had withdrawn her consent that the child should remain in his Home, and that arrangements had been made for its being handed over to a Roman Catholic institution. That letter was in the ordinary course received at the Home on 12th November. On the 16th of the same month, while that letter was lying at the Home, the child was made over to Mr. Norton under extraordinary circumstances, under circumstances and under an arrangement which shewed an anxious desire not to know where the child would be, and which create in my mind a belief that the appellant desired not to know where the child was, in order that his ignorance might be an answer to any proceedings which might be taken. I am aware that the appellant has said in his later affidavit that he did not receive or hear of that letter of 12th November, and the other letter written by Mr. Hope on 16th November, till 27th November; but in his earlier affidavit he stated that, before handing over the infant to Mr. Norton as aforesaid, he had on 12th November received a letter from a Mr. Newdigate informing him that about a month before Mrs. Gossage had called on the writer to express a desire for a Catholic home for the boy. In his later affidavit he says that he did not personally receive the letter, and that he did not mean that he personally received it; but seeing that he personally handed over the child to Mr. Norton I certainly did read the first affidavit, as I believe any one else would have read it, as meaning that he had personally received the letter and handed the child over

with knowledge of what was contained in it. Now I do not desire to say anything more than this: that even the subsequent explanation of the appellant does not relieve my mind from the conclusion that either by himself or by the intervention of some of his agents or persons who assist him in carrying on the Home, the child was in fact made over to Mr. Norton in order to avoid process for its recovery. On 16th November Mr. Hope wrote a letter from St. Vincent's Home claiming the child and asking for an appointment to receive it. That was the same day on which the child was made over to Mr. Norton, and the question arises whether that letter was received before the child was so made over. The appellant now says that he did not see it personally or hear of its receipt till 27th November. The letter has been produced, and it bears a stamp as having been received on 18th November, which is admitted to have been an impossible date, because that day was a Sunday. We are therefore left in the greatest obscurity with regard to that letter. It is, in my opinion, of the highest importance to trace these letters exactly; to see who actually received them, who was aware of their contents, and what was done with regard to them. Somebody must have received and read the letter of the 11th, because an answer was sent. If we are to be asked to believe that the sending of these letters did not influence in some way the handing over the child on the 16th, I am bound to say that in my judgment the history of those letters ought to have been traced with exactitude and precision. Again, with regard to the letter of 16th November, there was a gentleman at the Home who had authority from the appellant to answer such a letter, and who, according to the appellant's statement, did answer it with that authority in his absence, but such answer was not sent till 15th December. I cannot believe that that delay occurred with no intent or purpose. I cannot help thinking that it was with the intent to delay the proceedings for a habeas corpus. When the letter was thus tardily replied to, what sort of reply was given? Was it a candid reply? I am sorry to say that in my opinion it was nothing of the sort. It was a letter not stating that the boy had been sent abroad, but suggesting the contrary, i.e., that it was contrary to the rules of the institution that he should be made over to the

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St. Vincent's Home. If people conduct their business in such a manner they must not be surprised if a Court views their conduct with suspicion. I think, therefore, that the circumstances of this case were such as to have made it incumbent on the appellant to repel the inference to which the circumstances themselves naturally give rise, that this child was handed over to Mr. Norton for the purpose of avoiding process that was expected to be issued. He has, in my judgment, not sustained the burden so cast upon him. I think, therefore, that the true conclusion upon the materials now before us is that the child was made over in order to evade process, and that if the process goes it is highly probable that the appellant may yet be able to produce the child. For these reasons I concur in dismissing the appeal.

Appeal dismissed.

Solicitors for appellant: *Nisbet & Daw.*

Solicitors for respondent: *Leathley & Phipson.*

E. L.

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Jan. 20.

HODGSON *v.* BELL.

Practice—County Court—Power to remit Action—Judgment under Order XIV. *for part of Claim—Reduction of Claim to a sum not exceeding* 100*l.*—"*Payment, an admitted Set-off or otherwise*"—*County Courts Act*, 1856 (19 & 20 *Vict. c.* 108), *s.* 26—*County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 7—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65, where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off or otherwise, to a sum not exceeding 100*l.*, an order may be made for the trial of the action in a county court.

In an action of contract brought in the High Court in which the claim indorsed on the writ originally exceeded 100*l.*, but had been reduced to an amount not exceeding 100*l.* by a payment by the defendant pursuant to a judgment under Order XIV., the plaintiff obtained an order for the trial of the action in the county court. The defendant appealed:—

Held, by Denman, J., that under s. 65 of the County Courts Act, 1888, there was jurisdiction to make the order:

Held, by Wills, J., that "payment," in s. 65 of the County Courts Act, 1888, refers only to payment before action, and that there was therefore no jurisdiction under that section to make the order.

Foster v. *Usherwood* (3 Ex. D. 1) and *Gray* v. *Hopper* (21 Q. B. D. 15, 246), considered.

APPEAL by the defendant against an order made by a master

under s. 65 of the County Courts Act, 1888, for the trial of the action in a county court. The claim indorsed on the writ was for 173*l.* 17*s.* 6*d.*, money lent and interest. The plaintiff had judgment for 101*l.* 14*s.* 6*d.* under Order XIV., and the defendant obtained leave to defend as to the residue of the claim. The defendant paid the plaintiff the amount of the judgment debt, and the plaintiff then applied for and obtained the order in question.

Charles, J., referred the matter to the Court.

Colam, for the defendant. There was no jurisdiction to make the order. The words of s. 65 of the County Courts Act, 1888 (1), "where such claim is reduced by payment, an admitted set-off

(1) By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65: "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding one hundred pounds, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly," &c.

By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 7: "Where in any action of contract brought or commenced in any of Her Majesty's superior courts of common law, the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*, it shall be lawful for the defendant in the action, within eight days from the day upon which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at chambers for a summons to the plaintiff to shew cause why such action should not be tried in the county court or one of the county courts in which the action might have been commenced; and on the hearing of such summons, the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly."

By the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 26: "Where in any action of contract brought in a superior court the claim indorsed on the writ does not exceed 50*l.*, or where such a claim, though it originally exceeded 50*l.*, is reduced by payment into court, payment, an admitted set-off or otherwise, to a sum not exceeding 50*l.*, a judge of a superior court on the application of either party, after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name."

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or otherwise," correspond to those in s. 7 of the County Courts Act, 1867 (1), and "payment" in that section has been held by the Court of Appeal to apply only to payment before action: *Foster* v. *Usherwood*. (2) In s. 26 of the County Courts Act, 1856 (1), the words are, "where such claim is reduced by payment into court, payment, an admitted set-off or otherwise." "Payment" in this section has been held by the Court of Appeal to include payment after action: *Gray* v. *Hopper*. (3) But these words are not repeated in s. 65 of the County Courts Act, 1888. In *Gray* v. *Hopper* (3), *Foster* v. *Usherwood* (2), is approved.

T. Willes Chitty, for the plaintiff. There was jurisdiction under s. 65 to make the order. The County Courts Act, 1888, is a consolidating Act of which the general effect is to extend the jurisdiction of the county courts. Sect. 26 of the County Courts Act, 1856, provided for the transfer of a large class of cases from the High Court to the county courts. It is impossible to suppose that the legislature intended to prevent the transfer of this class of cases in future. Sect. 65 of the County Courts Act of 1888 is not a mere repetition of s. 7 of the County Courts Act, 1867, on which *Foster* v. *Usherwood* (2) was decided. By s. 7 of the Act of 1867 the order could only be procured on the application of the defendant within eight days from the service of the writ. By s. 65 of the Act of 1888 the order may be procured on the application of either party "at any time." It follows that "payment" under this section may take place "at any time."

Colam, in reply.

WILLS, J. I am of opinion that there was no jurisdiction to make this order. The material words in s. 65 of the County Courts Act, 1888, "where the claim indorsed on the writ is reduced by payment, an admitted set-off or otherwise," are the same as those used in s. 7 of the County Courts Act, 1867, and in *Foster* v. *Usherwood* (2) the Court of Appeal held that "payment" in this section could only refer to payment before action. I feel a difficulty as to what was the precise ratio decidendi in that case. It is not very clearly stated in the judgments as they are reported. But if the ground of the decision was that the

(1) See note, ante, p. 303. (2) 3 Ex. D. 1.

(3) 21 Q. B. D. 246.

omission in s. 7 of the County Courts Act, 1867, of the words "payment into court," which are used in the corresponding section, s. 26, of the County Courts Act, 1856, limited the meaning of "payment" in the former section to payment before action, I think there is good reason for attributing the same effect to the omission of the same words in s. 65 of the County Courts Act, 1888. I think it difficult to suppose that s. 65 of this Act was framed without reference to the interpretation which had been put upon the words of the corresponding sections of the previous Acts in the cases of *Osborne* v. *Homburg* (1), *Foster* v. *Usherwood* (2), and *Gray* v. *Hopper* (3); and I think that, without incurring the reproach of a servile adherence to precedent, it is a reasonable view that where the legislature, deliberately as it would seem, incorporates into a statute of consolidation and amendment an expression which has already received judicial construction in one of the statutes so dealt with, there is good ground for interpreting the expression thus adopted in conformity with the decision.

The learned counsel for the plaintiff, in arguing in support of the jurisdiction to make the order, in effect transposed the words "at any time" in s. 65. These words, which are new, merely extend, as it seems to me, the time for applying for the order beyond the limits imposed by s. 7 of the County Courts Act, 1867. They do not, I think, in any way affect the meaning of the words "payment, admitted set-off or otherwise." These still indicate the conditions one of which must be fulfilled before the application can be made. If then "payment" in s. 65 of the Act of 1888 is to be construed, as I conceive it should be, in accordance with *Foster* v. *Usherwood* (2), the claim in this action had not been reduced by "payment" within the meaning of the section so as to entitle the plaintiff to apply for the order, and the order was, therefore, improperly made. My learned Brother is, however, of a different opinion, and I therefore withdraw my judgment.

DENMAN, J. I regret to say that I am unable to agree with my learned Brother. I think, with diffidence, that the Court is

(1) 1 Ex. D. 48. (2) 3 Ex. D. 1.

(3) 21 Q. B. D. 15, 246.

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at liberty to put its own construction on s. 65 of the County Courts Act, 1888. This was the view taken by a Court of this division, and by the Court of Appeal with respect to s. 26 of the County Courts Act, 1856, in *Gray* v. *Hopper* (1), and I do not think that we are precluded from taking the same view here by the consideration that the section which is before us contains words identical with those in s. 7 of the County Courts Act, 1867, on which the Court of Appeal placed a judicial construction in *Foster* v. *Usherwood*. (2) It is obvious that the effect of the County Courts Act, 1888, is to give the County Courts jurisdiction in many cases in which they had not jurisdiction under the previous County Courts Acts.

As regards s. 65 of the new Act, it ought, I think, to be remembered that, before the Act passed, it had been held in *Gray* v. *Hopper* (1) that payment after action might operate in reduction of a claim in contract in the High Court so as to bring it within the limit of the county court jurisdiction. An enactment to this effect might, therefore, have been expected in the new Act. But I confess that it seems to me almost absurd to construe "payment" in this section as limited to payment before action. The section contemplates the reduction by "payment" "in any action of contract brought in the High Court" of "the claim indorsed on the writ" from above to below 100*l*., the new limit of the county court jurisdiction. For my part I cannot conceive how a claim indorsed on a writ can be reduced by payment unless the payment may be made after the issue of the writ. It may be objected that this observation would have applied as regards *Foster* v. *Usherwood* (2), but, as I conceive that we are not bound by that decision, I do not regard this consideration as material. I therefore think that there was jurisdiction to make this order. The result is that the appeal will be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Stocken & Jupp, for Walter A. Lomer & Son, Southampton.*

Solicitors for defendant: *John Cotton & Son.*

(1) 21 Q. B. D. 15, 246. (2) 3 Ex. D. 1.

H. D. W.

GRIFFITHS *v.* SCHOOL BOARD OF YSTRADYFODWG. 1890 *Feb.* 4.

Practice—Costs—Plea of Tender before Action—Payment into Court—Taxation of Plaintiff's Costs—Order XXII., *r.* 7.

To a claim for money had and received to the plaintiff's use the defendants pleaded tender of a sum to the plaintiff before action, and payment of that sum into Court in full satisfaction of the claim. The plaintiff took the money out of Court in satisfaction of his claim, and sought to have his costs taxed under Order XXII., r. 7:—

Held, that the plaintiff was not entitled to proceed under rule 7, because the plea of tender raised an issue which remained unsatisfied upon the record, and in respect of which the defendants were entitled to go to trial.

APPEAL from a decision of Field, J., at chambers.

The writ of summons in the action was indorsed with a claim for 87*l.*, the balance alleged to be due from the defendants to the plaintiff for money had and received by the defendants to the use of the plaintiff. The defendants pleaded tender to the plaintiff before action brought of the sum of 38*l.* 15*s.*, and refusal of the plaintiff to accept the same, and that they had paid into Court that sum, which was sufficient to satisfy the plaintiff's claim in the action.

The plaintiff thereupon took out the 38*l.* 15*s.* in satisfaction of the claim in respect of which it was paid in, and duly gave notice thereof to the defendants, and after the expiration of four days from the service of that notice brought in his costs for taxation under Order XXII., r. 7.

The master refused to tax, on the ground that an undisposed of issue raised by the plea of tender remained upon the record.

The plaintiff having taken out a summons for an order directing the master to tax, Field, J., dismissed the application.

The plaintiff appealed.

H. Lynn, for the plaintiff. This case is similar to *Wheeler* v. *United Telephone Co.* (1) If the plaintiff is not entitled to have his costs taxed under Order XXII., r. 7, he must incur the expense of going to trial in order to get his costs, although, having taken the money out of Court in satisfaction of his claim, there is

(1) 13 Q. B. D. 597.

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practically a discontinuance of the action, and no issue to try. That state of things cannot have been intended by the rules.

Evans, for the defendants. The judge and master were right in holding that an undetermined issue remained upon the record. This case is distinguishable from *McIlwraith* v. *Green* (1), in which the Court of Appeal held that, where money was paid into Court with pleas denying liability, and taken out by the plaintiff in satisfaction of his claim, there was a practical discontinuance of the action as to the plea denying liability in respect of which the money was not paid in, and the plaintiff was entitled to have his costs taxed under Order XXII., r. 7. In the ordinary case of a plea denying liability, the defendant has a choice whether he will pay money into Court or not, but where tender is pleaded he is compelled by the practice to pay the money into Court.

[WILLS, J. If the plea of tender is made out, the action ought never to have been brought, and the defendant is entitled to his costs, and in order to get them he is obliged to go to trial and have the issue tried which is raised by the plea of tender. That is a very different state of things from that which exists where the defendant pays money into Court as an offer to buy peace, and pleads a denial of liability in case the plaintiff does not choose to accept the offer. If, in such a case, the plaintiff does take out the money in satisfaction of his claim, as he is entitled to do, there is no issue remaining to be tried, and no reason why he should not proceed to tax his costs under Order XXII., r. 7.]

H. Lynn, replied.

DENMAN, J. I am of opinion that the decision of the learned judge was right. The reasons for our judgment have already been suggested by my brother Wills during the arguments. The defendants have pleaded tender before action of the full amount which the plaintiff now admits is sufficient to satisfy his claim, because he has taken the money out in satisfaction of his whole claim. If, therefore, the plea of tender be made out, the plaintiff had no right to bring his action. The defendants have done the only thing they could. They have pleaded the tender and paid the money into Court. It is said that Order XXII., r. 7, entitles the

(1) 14 Q. B. D. 766.

plaintiff to his costs if he takes the money out in satisfaction of his claim. I can see nothing in the rule which compels us to say so, and I think that this appeal should be dismissed.

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Appeal dismissed.

Solicitors for plaintiff: *Baker & Nairne.*
Solicitors for defendants: *Purkiss & Co.*

W. A.

THE QUEEN *v.* THE JUDGE OF THE BLOOMSBURY COUNTY COURT AND CATTLE.

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Jan. 29, 30.

County Court—Jurisdiction—Metropolitan County Court Districts—Administration of Assets of Deceased Person—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 75, 84.

Sect. 75, sub-s. 3, of the County Courts Act, 1888, which provides that proceedings for the administration of the assets of a deceased person are to be taken in the court within the district of which the deceased had his last place of abode in England, or in which the executors or administrators, or any one of them, have their or his place of abode, does not apply to the metropolitan county court districts named in s. 84 of that Act. Where therefore the plaintiff in such proceedings dwells or carries on business in any of such districts, and the defendant dwells or carries on business in any other of such districts, the proceedings may be taken in the court within the district of which either the plaintiff or the defendant dwells or carries on business.

ORDER in the nature of a mandamus calling upon the judge of the Bloomsbury County Court and the defendant in certain proceedings entitled *Taylor* v. *Cattle*, to shew cause why the judge should not hear and determine the proceedings.

It appeared that a plaint in equity had originally been issued by the plaintiff against the defendant, but the matter resolved itself into proceedings for the administration of the assets of one Richard Cattle, of whom the plaintiff was a creditor, and the defendant was the widow and executrix. The deceased had his last place of abode at Holloway, outside the district of the Bloomsbury County Court, and the defendant continued to dwell there; but the deceased carried on business within the district of the Bloomsbury County Court, and the defendant continued to carry on the business at the same place. The plaintiff dwelt

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and carried on business within the district of the Bloomsbury County Court. The county court judge held that by reason of the provisions of s. 75, sub-s. 3, of the County Courts Act, 1888, he had no jurisdiction to try the action. (1)

F. J. Lowe, for the defendant, shewed cause. The county court judge was right in declining jurisdiction. Sect. 75 of the County Courts Acts, 1888, is an absolute exception to s. 74, and relates to special "proceedings" of a wholly different nature to the "actions or matters" dealt with by the earlier section; it is not modified by the provisions of s. 84, which deals with "actions or matters" as distinct from "proceedings," and which was merely

(1) By s. 74 of the County Courts Act, 1888 (51 & 52 Vict. c. 43): "Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant, or one of the defendants, shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced, by leave of the judge or registrar, in the court within the district of which the defendant or one of the defendants dwelt or carried on business at any time within six calendar months next before the time of commencement, or with the like leave in the court in the district of which the cause of action or claim wholly or in part arose."

By s. 75: "The provisions of the next preceding section shall not apply to any of the following proceedings; but . . . .

"(3) Proceedings for the administration of the assets of a deceased person shall be taken in the court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators, or any one of them, shall have their or his place of abode."

By s. 84: "Where a plaintiff shall dwell or carry on business in the district of the Bloomsbury County Court of Middlesex, or in the district of the Brompton County Court of Middlesex, or in the district of the Clerkenwell County Court of Middlesex, or in the district of the Lambeth County Court of Surrey, or in the district of the Marylebone County Court of Middlesex, or in the district of the Shoreditch County Court of Middlesex, or in the district of the Southwark County Court of Surrey, or in the district of the Westminster County Court of Middlesex, or in the district of the Whitechapel County Court of Middlesex, or in the district of the City of London Court, and the defendant shall dwell or carry on business in the district of any of the said courts, the action or matter may be commenced and all proceedings thereon taken and had either in the court of the district in which the plaintiff shall dwell or carry on business, or in the court of the district in which the defendant shall dwell or carry on business."

intended to extend the provisions of s. 74 in the case of certain named metropolitan county court districts.

Rose-Innes, contra, was not called upon to argue.

FRY, L.J. In this case the plaintiff, who carries on business within the district of the Bloomsbury County Court, is taking proceedings against the defendant, who carries on business within the jurisdiction, for the administration of the assets of the defendant's deceased husband, of whom she is alleged to be executrix de son tort, and the question for our determination is whether the judge at the Bloomsbury County Court had jurisdiction to try the case. In order to decide the point we have to consider three sections of the County Courts Act, 1888. Before doing so, however, I may observe that in the interpretation clause (s. 186) of that Act a definition is given both of "action" and "matter," by which it is said that the former "shall include suit, and shall mean every proceeding in the court which may be commenced as prescribed by plaint," and that the latter "shall mean every proceeding in the court which may be commenced as prescribed otherwise than by plaint." It appears, therefore, that the two expressions "action" and "matter" include all proceedings in the county court.

I now proceed to consider the three sections with which we have to deal. Pausing at the end of the first part of s. 74, it is obvious that, if there were nothing to qualify it, the judge would have had jurisdiction, inasmuch as the defendant carried on business within the district of the Bloomsbury County Court. But s. 75 constitutes an exception on s. 74, and enacts that the provisions of that section "shall not apply to any of the following proceedings" (it is obvious that the word "proceedings" is used as being equivalent to "actions" and "matters"); and sub-s. 3 provides that "proceedings for the administration of the assets of a deceased person shall be taken in the court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators or any one of them shall have their or his place of abode." In the present case the place of abode both of the deceased and of the defendant, his executrix, was out of the jurisdiction of the

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THE QUEEN v. JUDGE OF BLOOMSBURY COUNTY COURT.

FRY, L.J.

Bloomsbury County Court, and it is said that that fact prevents the judge of that court from having any jurisdiction over the proceedings. But we have further to consider the provisions of s. 84, which applies to the metropolitan county courts, and provides that where the plaintiff dwells or carries on business in the district of one of those courts, and the defendant also dwells or carries on business within any such district, the action or matter may be commenced in the court of the district in which the plaintiff dwells or carries on business, or in the court of the district in which the defendant dwells or carries on business. In this case both the plaintiff and the defendant carry on business within the jurisdiction of the Bloomsbury County Court, and therefore, if s. 85 applies, it is plain that the judge had jurisdiction. In my judgment that section does apply. The argument to the contrary practically comes to this, that in s. 74 the words used are "action or matter," in s. 75 "proceedings," and in s. 84 "action or matter," and that therefore s. 84 is an exception upon s. 74, but not upon s. 75. But the simple answer to that contention is that in s. 75 the word "proceedings" is used as being equivalent to "action or matter." Further, s. 74 is not a local one, but a general section applicable to the whole country, and therefore the exceptions contained in s. 75 are general; but s. 84 is a local section applicable to the metropolis and constitutes an exception both on s. 74 and s. 75; it was intended to consolidate the jurisdiction of the metropolitan county courts, and in my opinion it excludes, so far as those courts are concerned, the general exceptions contained in s. 75. I see no reason why s. 84 should not apply to the administration of the assets of a deceased person as well as to any other action or matter. The rule must be made absolute.

MATHEW, J., concurred.

Order absolute.

Solicitors for plaintiff: *Mann & Taylor.*
Solicitor for defendant: *T. A. Lee.*

W. J. B.

[IN THE COURT OF APPEAL.]

1889
Dec. 20.

IN RE WEBBER. EX PARTE WEBBER.

Bankruptcy—Practice—Appeal against Receiving Order—Notice to Official Receiver—Bankruptcy Rules, 1886, *r.* 134—*Rules of Supreme Court*, 1883, *Order* LVIII., *rr.* 2, 15.

Notice of an appeal against a receiving order, whether to a Divisional Court in Bankruptcy or to the Court of Appeal, must in every case, whether proceedings under the order have or have not been stayed, be served on the official receiver within the time limited by the rules for service on the petitioning creditor.

APPEAL by the debtor against a receiving order made in the Barnstaple County Court. The order had been made on May 22, 1889. Notice of appeal had been served on the petitioning creditors on June 11, and the appeal had been entered on June 23, but the appellant had not taken any steps to procure an earlier hearing. The appeal came on for hearing on November 13, and the Court then adjourned the proceedings in order that the official receiver might be represented. At the further hearing on November 15 it appeared that notice of the appeal had been served upon him on June 18, more than twenty-one days from the date of the order. No order had been made staying the proceedings pending the appeal.

1889. Nov. 15. *Herbert Reed*, for the petitioning creditors, and *W. P. Horton*, for the official receiver, took the preliminary objection, that the official receiver, not having been served with notice of the appeal within twenty-one days from the date of the order, in accordance with rule 134 of the Bankruptcy Rules, 1886, and Order LVIII., rr. 2 and 15, the appellant was not entitled to be heard.

T. C. Hindmarsh, for the appellant. It is not necessary to give notice to the official receiver of an appeal against a receiving order. The property of the debtor does not vest in him as it does in the trustee in bankruptcy, notice to whom of an appeal against an adjudication was held to be necessary in *In re Ward*,

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Ex parte Ward. (1) In *In re Fletcher, Ex parte Fletcher* (2) the Court rescinded a receiving order in the absence of the official receiver, though it directed that the order should not be drawn up immediately, so as to give him an opportunity for intervening.

It is also submitted that the time for appealing should, if necessary, be extended.

CAVE, J. The preliminary objection must prevail. I am clearly of opinion that the official receiver is a necessary party to every application for the rescission of a receiving order. The order is made, not for the benefit of the petitioning creditor, but for that of all the creditors. As soon as it is made they lose their ordinary remedies, and the official receiver becomes their representative. The petitioning creditor has no control over the receiving order. It cannot be rescinded by his mere consent. The result might otherwise be that, after procuring a good settlement of his own claim, he might proceed upon his petition in such a manner as to defeat the receiving order. The question does not now arise for the first time. In *In re Fletcher, Ex parte Fletcher* (2), where the ground of the application was that the petitioning creditor had been settled with, we held that, though the petitioning creditor made no objection, it was essential that the official receiver should be before the Court. That is an express decision in favour of the objection.

As to the application to extend the time for appealing, a similar application was refused in *In re Ward, Ex parte Ward* (1), where the question was one of notice to the trustee, who stands in the same position as the official receiver; but the grounds of the refusal do not appear. I am, however, of opinion that in this case the time for appealing ought not to be extended. Since June the debtor has had opportunities of bringing on the appeal for hearing, but he has not availed himself of them. I think that in this he has been negligent where it behoved him to be urgent, and that he ought not therefore to be granted this indulgence. A person who appeals against a receiving order, and does not use due diligence in prosecuting his appeal, is not, in

(1) 15 Ch. D. 292. (2) 4 Mor. Bank. Cas. 113.

my opinion, entitled to have the rule relaxed in his favour. The appeal will therefore be dismissed.

CHARLES, J. I am of the same opinion. *In re Fletcher, Ex parte Fletcher* (1) decides that the official receiver is an essential party to an appeal against a receiving order. This being so, *In re Ward, Ex parte Ward* (2) applies. I also think, for the reasons given by my learned brother, that the case is not one for indulgence.

Appeal dismissed.

H. D. W.

The Court refused to give leave to appeal to the Court of Appeal.

1889. Dec. 20. The application for leave to appeal was renewed in the Court of Appeal.

T. C. Hindmarsh, for the debtor.

Herbert Reed, for the petitioning creditors.

Guiry, for the official receiver.

The arguments adduced in the Divisional Court were repeated and the same authorities were referred to, and also *Ex parte Dixon* (3); *Ex parte Lamb* (4); *Ex parte Official Receiver* (5); *In re Ellis* (6); *In re Harris.* (7)

LORD ESHER, M.R. The Divisional Court refused to proceed with the appeal in this case, on the ground that the official receiver had not been served with notice of it in accordance with the rule of practice which has been laid down by that Court, that they will not hear an appeal from a receiving order made by a county court unless the official receiver has been served with notice of the appeal within the same time within which the petitioning creditor must be served. I have consulted Cave, J., upon this matter, and I understand from him that he has the strongest opinion that on the ground of expe-

(1) 4 Mor. Bank. Cas. 113.
(2) 15 Ch. D. 292.
(3) 13 Q. B. D. 118.
(4) 19 Ch. D. 169.
(5) 19 Q. B. D. 174.
(6) 2 Ch. D. 229, 797.
(7) W. N. 1889, p. 201.

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diency it is necessary that this rule should be acted upon as regards appeals to the Divisional Court. It is contended, on behalf of the debtor, that the Divisional Court were bound to hear the appeal, and that they ought to have heard it, notwithstanding that the rule of practice laid down by that Court had not been obeyed. Whether the official receiver is or is not a party "directly affected" by the appeal within rule 2 of Order LVIII. seems to me doubtful, but I do not think it is necessary on the present occasion that we should determine whether he is "directly affected," for, if he is not, the Court of Appeal, that is, in this case, which is an appeal from a county court, the Divisional Court may, under rule 2, "direct notice of the appeal to be served on all or any of the parties to the proceeding, or upon any person not a party." Whether, therefore, the official receiver is a party "directly affected" by the appeal or not, it is clear to my mind that he is a person affected by it, and that rule 2 empowers the Divisional Court to give the direction which they have given as to the practice in that Court. And, if they had power to make that rule as regards their own Court, can we say that is a wrong rule to make? As I have already said, I have consulted Cave, J., about it, and he has convinced me that, so far from its being a wrong rule, it is a very desirable rule and a very good rule to make. Therefore the rule was an existing rule and it had not been obeyed, and this entitled the Divisional Court to say at once that they would not hear the appeal.

But, nevertheless, I have no doubt that under rule 15 the Divisional Court might have given leave to proceed with the appeal, and they might have done that in various ways. They might probably have postponed the case, though that might not have been necessary in this particular case, because the official receiver had in fact been served with notice before the appeal came on to be heard, but still they might have postponed the hearing so as to give the official receiver any time they thought right to make inquiries. The Divisional Court, however, declined to do that. The rule having been broken, the question whether an indulgence should be granted or not was clearly a matter of discretion. Still this Court is not bound to agree with the

exercise of discretion by the Divisional Court, but if we did not, we should have to exercise the discretion ourselves. Therefore I cannot say that the Divisional Court were bound to go on with the appeal. Ought we to give indulgence to this debtor? I am of opinion, upon full consideration of the facts, that he is not entitled to any indulgence.

But on a recent occasion, in *In re Harris* (1), we said that we would consider what ought to be the rule as regards appeals to this Court. I have already said that I think the rule laid down by the Divisional Court is a good one as regards appeals to that Court. I was at first somewhat alarmed at the idea of requiring notice to be given to the official receiver of appeals to this Court in the same way. I did not know what the expense might be, and I have a great desire that the expenses of litigation in this Court should be kept down, and that no unnecessary steps should be taken. But on inquiry I find that the expense of serving notice upon the official receiver must be very small. Therefore, having heard the reasons given by Cave, J., for the rule in the Divisional Court, I have come to the conclusion that it would be right for us to lay down the same rule with regard to appeals to this Court against receiving orders. Therefore, the rule in future in this Court will be, that, when there is an appeal against a receiving order, and notice is served, as it must be, within the time limited by the rules, on the petitioning creditor, notice shall in all cases, whether there has or has not been a stay of proceedings, be given to the official receiver within the same time. That will make our rule the same as the rule in the Divisional Court. We shall, of course, reserve to ourselves entirely the power given by rule 15 of Order LVIII., of extending the time for appealing under special circumstances. But the rule which we now say we shall require to be acted upon in future ought not, I think, to affect in any way the rule which we stated in *Ex parte Dixon* (2) for the guidance of the official receiver, viz., that, although he is served with notice of the appeal, he ought not to appear on the hearing unless there are material circumstances which he desires to bring before the Court. If he can inform the Court of something which he thinks it ought to know, then he is bound to be here.

(1) W. N. 1889, p. 201.

(2) 13 Q. B. D. 118.

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If he thinks wrongly that he ought to be here, and the Court comes to the conclusion that he need not have appeared, then he will be exposed to the danger of not being allowed his costs. If he has something material to tell the Court he ought to do so, but, if he has nothing to say which can assist the Court, he ought not to come here and put the estate to the expense of his appearance only for the purpose of asking for his costs. Neither do I think that the rule which we have thus laid down will ever authorize the official receiver to break that which I apprehend should be the rule of his conduct, viz., that he must not be a partisan in the matter; he ought to stand by and see only that that which is right is done to all parties. Under the circumstances, I am of opinion that this application should be refused with costs.

LINDLEY, L.J. I am of the same opinion. The general question, whether, before adjudication, an official receiver is a party "directly affected," within the meaning of Order LVIII., rule 2, by an appeal against a receiving order, appears to me open to some doubt, and that doubt is fortified by the fact that it has not been hitherto the practice so to consider him. But, being fully alive, as we all are, to the extreme danger of collusive applications to discharge receiving orders, I entirely concur in the rule which the Master of the Rolls has laid down, that the official receiver is in all cases in future to be served with notice of appeals against receiving orders. In *In re Harris* (1) we thought that he need not be served if the proceedings under the order had been stayed. But in that case we took the precaution of sending for the official receiver, and we ascertained that there was no collusion. I quite agree in the rule which the Master of the Rolls has enunciated, and in the reasons which he has given for it.

LOPES, L.J. When *In re Harris* (1) came before this Court I entertained, and I have ever since entertained, a strong opinion of the expediency of the rule which has now been enunciated by the Master of the Rolls. I think it is a most salutary rule, and one which is likely to prevent collusion between the debtor and

(1) W. N. 1889, p. 201.

the petitioning creditor behind the back of the official receiver. I do not think that the expense will be such as to militate against the expediency of the rule. Whether the official receiver is a party "directly affected" by the appeal within the meaning of Order LVIII., rule 2, must be doubtful, because both my lord and Lindley, L.J., have said so. But, speaking for myself, I should have thought that, having regard to the fact that the official receiver represents the general body of the creditors, having regard to the duties which he is called upon to discharge, and to his position, responsibilities, and liabilities, he was a party "directly affected" by the appeal, more especially as on an appeal against a receiving order the very existence of his office is called in question.

However, it is unnecessary to decide that point now, and I do not intend in any way to decide it, although I have expressed my individual opinion about it. Under the circumstances, I think the application should be refused.

I have no doubt that the Divisional Court could have extended the time for serving the official receiver, if they had thought it a fit case for doing so. Nor have I any doubt that this Court could extend the time, if it thought fit. The question is, whether, under the peculiar circumstances of the case, any indulgence ought to be granted to the debtor. Having regard to the facts which have been brought before us on affidavit, I am clearly of opinion that he is not entitled to any indulgence.

I quite agree with the Master of the Rolls that the official receiver ought not to appear, unless he has some substantial ground for so doing.

Leave to appeal refused.

Solicitors: *Morice, Toller, & Blakesley, for Toller & Roberts, Barnstaple; Church, Rendell, & Co., for A. F. Seldon, Barnstaple.*

W. L. C.

1890
Jan. 17.

[IN THE COURT OF APPEAL.]

IN RE CROOK. EX PARTE CROOK.

Bankruptcy—Act of Bankruptcy—Notice of suspension of Payment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4. *sub-s.* 1 (*h*).

In order that a notice given by a debtor to his creditors may be a notice "that he is about to suspend payment of his debts," within the meaning of sub-s. 1 (*h*) of s. 4 of the Bankruptcy Act, 1883, and therefore an act of bankruptcy, it must be an unqualified, unconditional notice from which an ordinary man of business would understand that, if the creditors would not accept less than was due to them, the debtor had no alternative but to suspend payment.

A trader sent the following circular to his creditors: "Being unable to meet my engagements as they fall due, I invite your attendance" [at a specified place and time], "when I will submit a statement of my position for your consideration and decision."

Held, by the majority of the Court (Lord Esher, M.R., and Bowen, L.J., Fry, L.J., dissenting), that the circular was a notice that the debtor was "about to suspend payment of his debts," within the meaning of s. 4, sub-s. 1 (*h*).

By Fry, L.J., that the circular was not an unqualified and unconditional notice of an intention to suspend payment, and was therefore not such a notice as was contemplated by the section.

APPEAL against a receiving order, on the ground that no act of bankruptcy had been committed by the debtor.

The debtor was a draper, and the act of bankruptcy relied upon was, that on December 2 he had sent a lithographed circular to each of his creditors in the following terms: "Being unable to meet my engagements as they fall due, I invite your attendance at the Guildhall Tavern, Gresham Street, on Wednesday next, at 3 P.M., when I will submit a statement of my position for your consideration and decision." The Wednesday referred to in this circular was December 4. The creditors met on that day, and the debtor offered them a composition of 2*s.* 6*d.* in the pound, which they refused to accept. The registrar held that the circular amounted to an act of bankruptcy within sub-s. 1 (*h*) of s. 4 of the Bankruptcy Act, 1883, and accordingly made a receiving order. The debtor appealed.

Herbert Reed, and *Mellor*, for the debtor. The circular of December 2 is not a notice that the debtor "is about to suspend

payment of his debts" within sub-s. 1 (*h*) of s. 4 (1) of the Bankruptcy Act, 1883, and is not, therefore, an act of bankruptcy. A mere declaration that a debtor is unable to pay his debts in full does not come within sub-s. 1 (*h*). Such a declaration is within sub-s. 1 (*f*), and in order that it may operate as an act of bankruptcy it must be "filed in the Court": *Ex parte Oastler* (2); *In re Lamb* (3); *Re Fleming, Fraser, & Co.* (4) The circular means no more than this, "I am not able to pay all my debts, and I will submit a proposition for your consideration." The meeting of creditors might resolve to accept a composition, or they might resolve that the debtor should continue to carry on his business. He asks the creditors to decide what he is to do. The words "being unable to meet my engagements as they fall due" are surplusage; if they were not there, a business man would understand the circular in the same sense, and then it would not be a fair inference to draw that, if the creditors did not accept the debtor's offer, he had no alternative but to stop payment.

Rowland Whitehead, for the petitioning creditors. The case is within the decision in *In re Lamb*. (3) There is no difference in substance between the circulars in the two cases. The only difference is, that here the circular does not state the amount of the composition which the debtor is prepared to offer. It is really an unqualified notice of his intention to suspend payment. He means, "I will submit to you a proposition for suspension of payment." There must be a suspension of payment, either voluntarily or under the direction of the creditors.

Herbert Reed, in reply.

LORD ESHER, M.R. This case must depend entirely upon the true construction of the circular of December 2, which is relied on as an act of bankruptcy, having regard to sub-s. 1 (*h*) of s. 4 of the Bankruptcy Act, 1883. The circular must be interpreted

(1) Sect. 4 provides: (1) "A debtor commits an Act of bankruptcy in each of the following cases (inter alia):—

"(*f*) If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself:

"(*h*) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

(2) 13 Q. B. D. 471.

(3) 4 Mor. Banky. Cas. 25.

(4) 60 L. T. (N.S.) 154.

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according to the ordinary business meaning of the words. The language was business language, used between a trader and his creditors, and evidently used with reference to that which might or might not happen under the bankruptcy law to a trader who had creditors. The only circumstances which we can take into account in construing the circular are those which existed on December 2, and which were known to both parties—the debtor and his creditors—viz., that a man who had been carrying on a trade had become indebted, and desired to speak to his creditors. Does then this circular, or does it not, amount to a notice that the debtor "is about to suspend payment of his debts"? The first thing to be observed is, that he has made up his own mind (whether rightly or wrongly is immaterial) as to his own position. He tells his creditors that he is unable to meet his engagements as they fall due. That is his own view of his own position. He does not ask their opinion about it; his mind is made up. Then he goes on to say, "I invite your attendance at the Guildhall Tavern, on Wednesday next, when I will submit a statement of my position for your consideration and decision." What is the meaning of these words when addressed to his creditors by a trader at a time when he has made up his mind, and tells his creditors, that he is unable to meet his engagements as they fall due? I do not think the fair business meaning of the words is, "I am about to submit to your decision the question whether I am able to meet my engagements or not;" he has already told them that he cannot. I think the words mean, that he intends to submit a proposition to his creditors. It cannot be a proposition to pay his debts in full. He cannot mean, "I am going to ask you to allow me to go on trading, though I am unable to pay my debts as they become due." It must mean, "I am going to submit to you a proposition to take something less than is your due. If you will do that, I shall be able to go on with my business without being made a bankrupt; if you will not do that, I shall be unable to go on." It meant this, "I intend to suspend payment of my debts—I cannot help doing so—unless you will agree to accept something less than your due." This then being the true meaning of the circular, did it amount to a notice within sub-s. 1 (*h*), that the debtor was about to suspend

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IN RE CROOK.
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payment of his debts? I think it did. It meant that he must go into bankruptcy, unless the creditors would accept payment of a part of their debts, which would be a partial suspension of payment.

Lord Esher, M.R.

The point was considered by this Court in *In re Lamb.* (1) The headnote to that report (which, I think, accurately represents the effect of the judgments), is as follows: "Held, that, in considering the question whether a statement made by a debtor to any of his creditors amounts to a notice that 'he has suspended, or that he is about to suspend payment of his debts,' within s. 4, sub-s. 1 (*h*) of the Bankruptcy Act, 1883, it is necessary in each case to estimate the reasonable construction which those persons who receive such statement of the debtor would, under the circumstances of the debtor's case, have a right to assume to be his meaning as to what he intends to do with respect to paying or suspending payment. Where the language of the debtor can only lead his creditors to infer that, if an offer of a composition made by him is not accepted, suspension is the only alternative, such statement will amount to a notice within the section."

In the present case the debtor was about to make his creditors an offer of a composition which, if it was not accepted, must lead to a suspension of payment by him. He says that he is unable to pay his debts in full, and there must be a suspension of payment, unless the creditors will agree to take something less than what is due to them. According to the decision in *In re Lamb* (1), we must have regard to the construction of the particular document made use of in each case, and, in my opinion, the true construction of the circular in the present case is such as brings it within sub-s. 1 (*h*) of s. 4. The decision in *Re Fleming, Fraser & Co.* (2), does not profess to be contrary to *In re Lamb* (1), but I do not intend to express any opinion as to the way in which we should deal with such a case, if it came before us.

BOWEN, L.J. I am of the same opinion, and I put exactly the same construction on the circular of December 2 as the Master of the Rolls has done. I think the expression "being unable to

(1) 4 Mor. Banky. Cas. 25. (2) 60 L. T. (N.S.) 154.

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IN RE CROOK. EX PARTE CROOK.

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meet my engagements as they fall due" is one perfectly familiar among business men, and that the letter must have been taken to mean that the debtor was going to propose to his creditors a composition, as to the acceptance of which they were to decide, but to which, if they did not accept it, suspension of payment was the only alternative. If that is the true construction of the circular, the case is within the principle of *In re Lamb.* (1) If the circular amounted only to a statement that the debtor would suspend payment on the happening of some contingency, the result might be different; but I do not so read the words. It must not be forgotten that this is a business communication. I am reported to have said in *In re Lamb* (2), "We ought to take the circular in its business sense, then to find the circumstances of the debtor under which he makes it, and then to see what the statement came to." I only desire to add to that (and I think what I said must have been so understood at the time), that the circumstances of the debtor must be considered so far only as they were known to all parties at the date of the circular. As to *Re Fleming, Fraser & Co.* (3), if the decision there is contrary to *In re Lamb* (1), I think it is wrong. If it is right, it is upon the ground that the circular sent by the debtor in that case differed from that which was sent in *In re Lamb.* (1) But as regards some of the expressions made use of by Cave, J., in his judgment in *Re Fleming, Fraser & Co.* (3), I desire to reserve my opinion.

FRY, L.J. I have the misfortune to differ from the Master of the Rolls and Bowen, L.J., on a material point, that is, the construction of the circular of December 2, and, differing from them, I need hardly say that I mistrust my own opinion. But it appears to me that, in order that a notice given by a debtor to his creditors should be within sub-s. 1 (*h*) of s. 4, a notice that "he is about to suspend payment of his debts," it must be an unqualified, unconditional notice of his intention to suspend payment. A notice, for instance, that he intends to suspend payment if a strike of his workmen should occur, or if a particular cargo should be lost, or if a specified correspondent should fail, would

(1) 4 Mor. Banky. Cas. 25. (2) 4 Mor. Banky. Cas. 34.
(3) 60 L. T. (N.S.) 154.

not be within the section. Is, then, this circular of December 2 an unqualified, unconditional notice of the debtor's intention to suspend payment? As I read it, it is not. I place myself in the position of a creditor who received it, and I think that to him it would mean this, "I shall suspend payment, unless at the meeting to be held on Wednesday next my creditors shall otherwise direct." He fixes an early day for the meeting of his creditors, and he calls upon them to decide what he is to do. He takes them into council with him, and asks them to decide what he ought to do. No doubt, the circular was very likely to lead to a composition with the creditors, but it might lead to the continuance of the debtor's business with the approval of his creditors. I think that *In re Lamb* (1) differed from the present case, because there the debtor said in substance to his creditors, "You must either accept the 5*s.* in the pound which I offer you, and allow me to suspend payment of the remaining 15*s.*, or I shall suspend payment altogether." Quacunque viâ, it was a notice of his intention to suspend payment. But in the present case the circular is, as it seems to me, only a notice of the debtor's intention to suspend payment, unless his creditors shall at the meeting which he summons decide otherwise.

Appeal dismissed.

Solicitors: *G. Lennox*; *Phelps, Sidgwick & Biddle.*

(1) 4 Mor. Banky. Cas. 25.

W. L. C.

1889
Dec. 18.

[IN THE COURT OF APPEAL.]

IN RE AN ARBITRATION BETWEEN THE LONDON, TILBURY AND SOUTHEND RAILWAY COMPANY AND THE TRUSTEES OF THE GOWER'S WALK SCHOOLS.

Lands Clauses Act—Compensation—Obstruction of Lights—Land injuriously affected—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 16—*Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 63, 68.

The claimants, being the owners of certain buildings with ancient lights, pulled them down and erected a new building on their site. The position of certain portions of the windows of the new building coincided with that of portions of the old windows, while other portions of the new windows occupied wholly different positions. Before any right to the access of light to the non-coinciding portions of the new windows had been acquired, a railway company, in the exercise of their powers, erected a warehouse which obstructed the lights of windows in the new building :—

Held (affirming the judgment of the Queen's Bench Division) that the claimants were entitled to compensation in respect of the whole of the windows so obstructed, including the windows and portions of windows which did not coincide with any of the ancient lights.

APPEAL from the judgment of the Queen's Bench Division (reported ante, p. 40), on a case stated by an arbitrator under the Lands Clauses Act.

The trustees of certain schools, known as the Gower's Walk Schools, in 1884 removed to a new site in Lambeth Street, Whitechapel, upon which stood certain old buildings, the whole of the windows of which were ancient lights. They pulled the old buildings down and erected upon their site a schoolhouse, printing-house, and workshops.

Some of the window spaces in the new buildings did not correspond in position with or include any of the ancient window spaces, while others included the whole or substantial parts of certain of the ancient windows, but were larger in area than such ancient windows.

In 1886 the London, Tilbury and Southend Railway Company, in the exercise of the powers conferred upon them by their special Act (which incorporated the Railways Clauses and Lands Clauses Acts), erected on the opposite side of Lambeth Street a warehouse, which they raised to such a height as to obstruct the light of certain of the windows of the trustees' new buildings.

The trustees claimed compensation in respect of the whole of the windows so obstructed, including windows and portions of windows which did not coincide with any of the old lights. The company, on the other hand, contended that they were liable to pay compensation only in respect of damage to the coinciding portions.

The arbitrator assessed the compensation at 1450*l.*, if the claimants were entitled to have it assessed on the former basis, and at 725*l.* if they were only entitled to have it assessed on the latter. The question for the opinion of the Court was which basis of assessment was correct.

The Divisional Court gave judgment for the claimants on their contention that they were entitled to the larger amount.

The company appealed.

R. S. Wright, and *C. Haigh*, for the appellants. The respondents are not entitled to compensation in respect of those windows which did not correspond with the ancient lights. It is hardly necessary to cite the cases which establish the principle that compensation can only be claimed in respect of injuries which, but for the statute empowering the acts to be done, would be actionable wrongs. That principle is stated by Lord Penzance in *Metropolitan Board of Works* v. *McCarthy*. (1) The only exception to the rule is stated in *In re Stockport, Timperley & Altrincham Ry. Co.* (2), where the decision was that the rule had no application to cases where the act complained of was done on the claimant's land which had been taken from him by the company under the powers of their statute. The same proposition is stated in *Cowper Essex* v. *Local Board for Acton* (3) by Lord Halsbury, L.C. (at page 161), and Lord Watson (at page 164). In *Duke of Buccleuch* v. *Metropolitan Board of Works* (4) there was a taking of land. Lord Chelmsford expressly points out (at page 459) that even if the claimant had only an easement over the causeway which was there taken, still the deprivation of that easement amounted to a taking of land, for by the Thames Embankment Act the word "lands" included "easements." The

(1) Law Rep. 7 H. L. 243.
(2) 33 L. J. (Q.B.) 251.
(3) 14 App. Cas. 153.
(4) Law Rep. 5 H. L. 418.

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decisions in all the above cases have proceeded on the view that where a piece of a man's land is compulsorily taken, and is made the spot upon which something is done to injure his other land, then he is entitled, in respect of that injury, to compensation under s. 63 of the Lands Clauses Consolidation Act, 1845. But it would be going much further than the decided cases have gone to say that the principle applies where, as is the case here, no land has been taken. The decisions in cases where land has been taken under s. 63 have no application to a case like this where an easement only has been taken away from the claimants. "Land" does not include "easement": *Pinchin* v. *London & Blackwall Ry. Co.* (1) The respondents, therefore, are only entitled to compensation for that which, but for the statute, would have been an actionable wrong, namely, the deprivation of their ancient lights. It is a fallacy to suppose that they can claim compensation for being deprived of their right to an injunction, because the Act itself abolishes that right. *Knock* v. *Metropolitan Ry. Co.* (2) has no application to the present case.

Bosanquet, Q.C., and *Houghton*, for the respondents. But for the statute these windows could never have been obstructed, for there was a right to a continuance of the light which would fall from any quarter on the old part of the windows. This was an absolute right which could have been enforced by injunction. The destruction of this right has affected the value of the premises, and is a damage to the owners who are entitled under the statute to full satisfaction for all damage sustained by reason of the exercise of the powers. It is not material whether such damage would have been actionable or not, for the word "damage" is to be taken in a wide sense: *Cowper Essex* v. *Local Board for Acton* (3), and that principle applies whether land has been taken or not.

R. S. Wright, in reply.

Cur. adv. vult.

Dec. 18, 1889. LORD ESHER, M.R. The question raised by this special case is this. The railway company were authorized

(1) 5 De G. M. & G. 851. (2) Law Rep. 4 C. P. 131.
(3) 14 App. Cas. 153.

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by statute to erect a large warehouse close to one side of Lambeth Street. On the other side of this somewhat narrow street were the school houses of the trustees. In these buildings were windows some of which occupied positions in whole or in part of certain ancient lights while others did not. The warehouse undoubtedly interfered with the light of both classes of windows. The company are bound to compensate the trustees for any damage suffered by them by the injurious affecting of their property. That the company have injuriously affected the property was not denied, for they have done that which, if it had not been for the authority of the Act, would have been actionable. In this state of facts the arbitrator has given two figures, one representing the amount of the injury caused by obstructing the ancient lights, the other the amount of injury caused by obstructing all the lights that are obstructed. That the company are bound to pay the first of these sums is not questioned, but only whether they are bound to pay the larger amount. The doubt that affected some of us, or at all events, myself, during the argument was this—inasmuch as if the company had only interfered with the light of the modern windows or those which were not ancient lights the trustees would have had no cause of action, should compensation be paid under the Act for the injury to those lights? Supposing the company had been in the ordinary position of owners of land and not affected by any statute and had then done what they have done, the trustees would have been entitled to sue them in a common law action for interference with ancient lights, could the plaintiffs in such an action have recovered damages in respect of injury to all the lights affected, the new as well as the old? On this point the rule seems to me to be that where a plaintiff has a cause of action for a wrongful act of the defendant the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act and so probable a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act. If that be so, and a person puts up buildings, the inevitable consequence of their erection being to obstruct ancient and modern lights, should he not be taken to have foreseen that in obstructing the one he

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would obstruct the other? If that were proved in a common law action the plaintiff would be entitled to damages for the whole of the consequences of the wrongful act of obstructing ancient lights, which would include damage to the new as much as to the old lights. If so, it seems to me obvious that compensation must be given under the statute to the same extent.

Suppose, however, that the rule is otherwise, and that in such an action the plaintiff could only recover damages for injury to ancient lights, can he under the Railways Clauses Act, 1845, s. 16, get compensation for the injury to both classes of lights? That depends on the construction of the section. By it the company are to make full satisfaction for all damage sustained by reason of the exercise of the powers. The question is whether on the true construction of these words, where something is done in pursuance of the powers of the Act, there is given to the person against whom the powers are put in force something more than the legal damage which could have been recovered in an action. If the two words "full" and "all" were omitted from the section, and it ran thus, "the company shall make satisfaction to all parties interested for damage by them sustained by reason of the exercise of such powers," that would cover legal damage, so it may be said that, if the statute only gives actionable damage, those words are tautology. But for superior authority, I myself should have been inclined to say that, unless an Act says so in most clear and distinct terms, it should not be held to give more than legal damages and that those words did not carry the case further. But in *Cowper Essex* v. *Local Board for Acton* (1), in which I think I expressed this view, an appeal was taken from this Court to the House of Lords. In that case some land had been taken, and by what was done on that land other land was injuriously affected. In such a case the House of Lords have said, as I understand, that more can be recovered as compensation than as legal damage in an action. I confess I can only find one phrase from which I can get a clear apprehension of what the House meant and that is in the judgment of the Lord Chancellor, at p. 161. He says: "Where part of a proprietor's land is taken from him, and the future use of the part taken may

(1) 14 App. Cas. 153.

damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works." That seems to me to shew that under the statute there may be an injurious affecting, for the purpose of compensation, by something which would not be the subject of an action at common law; because it is obvious that the user of the land in the way there suggested would not, if it did not amount to a nuisance, have given a cause of action.

The House of Lords approved the *Stockport Case* (1) and the *Duke of Buccleuch* v. *Metropolitan Board of Works.* (2) In the latter case there was a taking of something which was equivalent to taking land, and that brought the case within the statute. The decision gave compensation for the use of the embankment after it was made which could not have been given at common law, and this conclusion I understand the House of Lords to adopt. There is this distinction that in the present case no land is taken, but on the question of damage how does this matter? The ratio decidendi is this —if you can bring the case within the statute, then the words "full satisfaction for all damages," are to give not only that which would be legal damage in an action but compensation for all the damage which the property has in fact suffered. If land is injuriously affected, that brings the case within the statute just as much as if land is taken. Applying the view taken by the House of Lords to this case, it appears to me that even if the larger amount could not have been recovered as damages at common law it can be recovered as compensation under the statute.

I think, therefore, that in either view the trustees were entitled to the larger amount, and that the judgment of the Divisional Court was right and that the appeal should be dismissed.

LINDLEY, L.J. I am of the same opinion. The key to this case is to be found in considering what it is that the railway company have in fact done. The trustees have a school house and certain land beside it, and that was worth so much money.

(1) 33 L. J. (Q.B.) 251. (2) Law Rep. 5 H. L. 418.

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The railway company have erected, on the opposite side of a not very wide street, a large building, and by doing that they have done two things: they have infringed the rights of the trustees by darkening certain ancient windows, and as a consequence of that they have diminished the value of the land by an amount found by the arbitrator to be 1450*l*. That is the necessary consequence of their wrongful act. On what principle are the railway company not to pay for that diminution in value? The railway company say they might have blocked up all the modern windows; but to this the trustees may reply, that more than this has been done, that their rights have been infringed, and that, though no action will lie because the infringement is authorized by an Act of Parliament, their case falls within the 16th section of the Railways Clauses Act, and that the consequence is that full compensation must be made, which full compensation is the difference between the value of the land as it was and as it is at present. Is there any authority to the contrary? I think not, but that what authority there is supports this conclusion. It has been said, and said with truth, that this case is not like the *Stockport Case* (1), and not like the case of *Cowper Essex* v. *Local Board for Acton* (2), because another section applies to those cases, namely, the 63rd section of the Lands Clauses Consolidation Act. But the controversy in the last-mentioned case was as to whether the owner of the lands was entitled to any compensation at all. This Court thought not, but the House of Lords thought otherwise. But the moment a case is brought within the compensation clauses, whether by reason of injurious affecting, or under s. 63, the measure of compensation is in all respects the same: it is full compensation for all damage. It appears to me that is the short answer to this case, and that the decision of the Court below was perfectly right, and that the appeal should be dismissed.

LOPES, L.J. Having regard to the authorities, and the words of s. 16 of the Railways Clauses Consolidation Act, 1845, this does not appear to me to be a case of much difficulty. As a fact, having regard to the position of the windows of the school

(1) 33 L. J. (Q.B.) 251. (2) 14 App. Cas. 153.

buildings, it is physically impossible to obstruct the light to the new, without at the same time obstructing the light to the ancient windows. Any interference with the ancient windows, in the absence of the special Act of Parliament, would have given the trustees a good cause of action against any one causing the obstruction. Again, if any unauthorized person had erected the warehouse and obstructed the ancient lights, the trustees would have been entitled to an injunction restraining him from so doing. In fact, they would by means of an injunction have been enabled to have prevented the erection of the warehouse. But the erection of the warehouse is authorized by legislative enactment. No injunction can therefore be obtained, and no action can be brought. These remedies are taken away, and the trustees are compelled to submit to an obstruction of the lights of the school, both old and new. The school has lost the unobstructed enjoyment of all these lights, and this by reason of the exercise of the powers of the special Act. If it had not been for the interference of the Legislature, the school would have kept all these lights to their full extent. The property has thus, by the exercise of the powers conferred by the special Act, been deteriorated in value to the extent of the larger sum found by the arbitrator.

This being the case, I am of opinion that the trustees are, in the words of s. 16 of the Railways Clauses Act, entitled to recover "full satisfaction for all damage" sustained by reason of the exercise of the statutory powers—that is 1450*l.*

Our decision is in accordance with the principle followed in *Duke of Buccleuch* v. *Metropolitan Board of Works* (1), and more recently in the case of *Cowper Essex* v. *Local Board for Acton.* (2) That principle I understand to be, that when the compensation clauses of the statute attach, the party who is injuriously affected is to be entitled to recover full compensation for all damage in respect of the deterioration in value of his property. I think, therefore, the appeal must be dismissed.

Appeal dismissed.

Solicitors for trustees: *Hanbury, Hutton, & Whiting.*

Solicitors for railway company: *F. C. Mathews & Browne.*

(1) Law Rep. 5 H. L. 418. (2) 14 App. Cas. 153.

A. M.

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Feb. 4.

WARD *v.* THE FOLKESTONE WATERWORKS COMPANY.

Waterworks—Constant Supply of Water—Prevention of Waste—"Apparatus for regulating Supply"—Screw-down Valves—Obligation to provide—Folkestone Waterworks Act, 1858 (21 & 22 *Vict. c. x.*), *ss.* 13, 14—*Waterworks Clauses Act*, 1847, *ss.* 48, 51, 52.

By a local Waterworks Act, passed in 1858, it was provided that, for the purpose of preventing waste of the water, all persons supplied with water by the waterworks company should provide "proper ball or stop-cocks or other necessary apparatus for regulating such supply," and that in case any such person neglected to provide such apparatus after being required to do so the company might cut off the water from his premises. At the date of that Act the supply of water provided by the company was intermittent. By another Act, passed in 1888, the company were required to provide a constant supply of water. It then, for the first time, became necessary for the prevention of waste, that a system should be adopted of inserting in each communication-pipe an apparatus, called a screw-down valve, whereby the water could be shut off from any premises in which there were indications of the water being permitted to run to waste:—

Held, that such a screw-down valve was not an apparatus for regulating the supply within the meaning of the former Act, and that the company could not justify cutting off the water from the premises of a person who neglected to comply with a notice requiring him to insert such a valve in his communication-pipe.

CASE stated by justices under 20 & 21 Vict. c. 43.

The appellant was the owner and occupier of a dwelling-house in the borough of Folkestone of the annual value of 28*l.* 15*s.* On September 13, 1889, the appellant, who for some years previously had been receiving a supply of water from the respondents, was served by them with a notice requiring him to provide and insert in his communication-pipe under the pavement of the street within seven days after the receipt of the notice a stop-valve, of the screw-down kind, such stop-valve to be protected with a cover and guard-box. The appellant was willing to comply with such notice, but was prohibited by the corporation of the borough of Folkestone, in whom the street is vested, from breaking open the pavement for this purpose. On September 25 the respondents gave the appellant notice that if their former notice was not complied with the supply of water would be cut off. On the same day the appellant tendered to the respondents the rates due for the current quarter, but such tender was refused.

On September 26, the appellant continuing to make default in inserting the stop-valve as required, the water was cut off. The appellant thereupon summoned the respondents, under s. 43 of the Waterworks Clauses Act, 1847, for unlawfully refusing to furnish him with a supply of water. The dwelling-house of the appellant was within the district within which a constant supply of water was provided by the respondents pursuant to s. 5 of the Folkestone Waterworks Act, 1888, hereinafter mentioned; and the justices found as a fact that it was necessary for the prevention of waste of water that screw-down valves should be inserted in communication-pipes in a district where a constant supply of water was provided.

It was contended by the appellant that, having regard to the statutory provisions hereinafter set out, he had no power to comply with the notice above mentioned, or to break up the pavement without the consent of the corporation, and that the respondents had no power to require him to insert a stop-valve and guard-box in the street as a condition of his title to a supply of water.

It was contended by the respondents, that having regard to the statutory provisions, they had such power to require him to put down such stop-valve, and to cut off the supply of water in default of his so doing.

By the Folkestone Waterworks Act, 1858 (21 & 22 Vict. c. x.), s. 13, "It shall be lawful for the company or the directors thereof from time to time, for the purpose of preventing the waste or misuse of water, to prescribe the size, nature, and strength of the pipes, cocks, cisterns, and other apparatus to be hereafter altered or fixed, and to interdict any arrangements, and the use of any pipes, cocks, cisterns, or other apparatus which may tend to such waste or misuse as aforesaid."

Sect. 14. "All persons supplied with water by the company shall provide proper ball or stop-cocks, or other necessary apparatus of approved construction, for regulating such supply, and shall keep the same in good repair, so that the water may be properly drawn off and effectually prevented from running to waste, and in case any such person shall, after being required by the company, neglect to provide such ball or stop-cocks or other

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necessary apparatus, or to keep the same in good repair, to the satisfaction of the company or their surveyor, the company may cut off the pipes or turn off the water from the premises of such persons respectively until such ball or stop-cocks or other necessary apparatus shall be provided or repaired, as the case may require."

By the Folkestone Waterworks Act, 1888 (51 & 52 Vict. c. xxv.), s. 5, sub-s. (2), "From and after the first day of July, 1889, the company shall afford for the domestic use of the inhabitants (of a certain specified district within the borough) a sufficient supply of pure water constantly laid on."

Sect. 6: "The company may, outside of and at or near the point at which the communication-pipe for the conveyance into any premises of the water supplied by the company enters those premises, attach to that pipe a sound and suitable stop-valve of the screw-down kind . . . . and every such valve shall be protected by a proper cover and guard-box, and the provisions of the Waterworks Clauses Act, 1847, with respect to the breaking-up of the streets for the laying of pipes, shall extend and apply to and for the purpose of inserting the said valves, covers, and guard-boxes."

By the Waterworks Clauses Act, 1847 (10 Vict. c. 17), s. 48, "Any owner or occupier of any dwelling-house . . . . who shall wish to have water from the waterworks of the undertakers brought into his premises . . . . may open the ground between the pipes of the undertakers and his premises, having first obtained the consent of the owners and occupiers of such ground, and lay any leaden or other pipes from such premises to communicate with the pipes of the undertakers."

Sect. 51: "Any person who shall have laid down any pipe or other works . . . . may remove the same" subject to certain conditions as to notice and compensation to the undertakers.

Sect. 52: "Any such owner or occupier may open or break up so much of any street as shall be between the pipe of the undertakers and his house, building, or premises . . . . for any such purpose as aforesaid."

The justices were of opinion that the respondents had power under 21 & 22 Vict. c. x., s. 13 to require the appellant to provide a

stop-valve and guard-box, and to fix it in the street or pavement to prevent the waste of water, that upon his default in complying with such requisition they had power under s. 14 of the same Act to cut off the supply of water, and that upon the true construction of the provisions of the Waterworks Clauses Act, 1847, the appellant had legally power to open the pavement for the purpose of fixing a stop-valve. They accordingly dismissed the summons. The question for the opinion of the Court was whether they were right in so doing.

Duke, for the appellant. Sects. 13 and 14 of 21 & 22 Vict. c. x., which empower the respondents to require the consumer to provide proper "ball or stop-cocks or other necessary apparatus for regulating such supply," do not apply to the case of a screw-down valve in the street. The "other apparatus" referred to is something ejusdem generis with ball-cocks, some apparatus to be used inside the house in connection with the cistern. Again, it is common ground between the parties that the object of the stop-valves in the street is this—the respondents' servants come round at night at a time when no water is being used, open the guard-box and apply an iron test-rod to the communication-pipe, which enables them to hear whether any water is flowing into the house, and in the event of their finding it so flowing they screw down the valve and stop the water. But that is not an apparatus for regulating the supply.

Even if the respondents had power to require the appellant to put down a stop-valve if he could obtain the consent of the road authority, they had no power to require him to do so in the absence of such consent. There is no statutory power in the owner or occupier of a house to break open the pavement for such a purpose.

G. Denman, (*Murphy, Q.C.*, with him), for the respondents. The only limitation on the kind of "other apparatus" that the respondents under ss. 13 and 14 of the Act of 1858 may prescribe and require the consumer to put down is that it shall be necessary for regulating the supply. Here it is admitted that stop-valves are necessary for the prevention of waste, which is the very object for which ball and stop-cocks are used in a

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cistern. In *East London Waterworks Co.* v. *Vestry of St. Matthew, Bethnal Green* (1), it was held that the laying down of these very stop-valves and guard-boxes was an act "necessary for supplying water" within the meaning of 10 & 11 Vict. c. 17, s. 28. Lord Esher there treated it as indisputable that a stop-valve was "necessary for the regulation of the supply." (2) With regard to the power of the appellant to break open the street, that is provided for by s. 52 of the Waterworks Clauses Act, 1847. Sect. 48 having provided that a consumer may lay down a communication-pipe, and s. 51 that he may take it up again, s. 52 provides that he may break up the pavement "for any such purpose as aforesaid," which must include repairs and alterations such as the insertion of these stop-valves.

CAVE, J. In this case the waterworks company claim the right to compel the consumer of water to put down a screw-down valve in the street in the pipe which connects his premises with the company's main, and it lies upon them to shew by very clear and unmistakeable language that they have that right. It is said that that right is given to them by the Act of 1858. Now, so far as s. 13 of that Act is concerned, I do not think it touches this case, for it does not give the company power to compel the consumer to put down any apparatus at all, it merely empowers them, in the event of his choosing to put down certain apparatus, to prescribe what the kind shall be, to prohibit him from putting down anything other than of an approved description. Sect. 14 is more to the point, for it does give the company power to compel the consumer to adopt certain precautions to prevent waste. It says, "All persons supplied with water by the company shall provide proper ball or stop-cocks." We all know what a ball or stop-cock is,—it is an apparatus used in a cistern for the purpose of admitting water into the cistern when it is not full, and excluding the water when it is full. Then the section goes on, "or other necessary apparatus of approved construction for regulating such supply . . . so that the water may be properly drawn off and effectually prevented from running to waste." The apparatus there spoken of must be something akin to a

(1) 17 Q. B. D. 475. (2) 17 Q. B. D. 480.

ball-cock, something, that is to say, which will prevent the water from running to waste consistently with its admission into the cistern as occasion may require. But the object of the screw-down valve which it is sought here to compel the consumer to put down is not to regulate the supply in the same manner in which the ball-cock regulates it, but to shut it off altogether. It seems to me, therefore, clear that the company had not under that section either the right which they seek to establish.

But, further, at the time when the Act of 1858 was passed, the company were compellable only to give an intermittent supply. They were not required to give a constant supply till 1888. And from the finding in the case that screw-down valves are necessary where there is a constant supply, we must assume that they were not necessary when the supply was only intermittent. When by the Act of 1888 the company came to be compelled to furnish a constant supply, it became necessary to consider what new protection they would require against waste, and what new powers might be necessary to enable them to give the constant supply with the least possible inconvenience and damage to themselves. They accordingly, by s. 6, took power to themselves to insert these stop-valves in the communication-pipes, without which power any interference by them with the communication-pipes, which are the property of the consumers, would be a trespass. But nowhere in the Act is any express provision to be found enabling them to require the consumer to put down these stop-valves, or to pay for the expense of putting them down; and if it had been intended that they should have that power one would have expected an express provision to that effect. Moreover, the consumer has no statutory power to break open the street for any such purpose. It is to the company, and to the company alone, that power to do so is given under s. 6.

I am of opinion, therefore, that the justices came to a wrong conclusion, and that they ought to have convicted the respondents. The case must be remitted back to them.

A. L. SMITH, J. I must protest against an attempt to construe an Act of Parliament by the light of legislation passed thirty years after its date. Under the Folkestone Waterworks Act, 1858,

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A. L. Smith, J.

the only thing which the company could compel the consumer to do, in order to prevent their water from running to waste, was to provide a sufficient ball or stop-cock, or some other apparatus of the same kind in connection with the cistern. Such a thing as a stop-down valve in the communication-pipe was at that time wholly unnecessary, and its use was never contemplated by any one. Then came the Act of 1888, by which the company were for the first time placed under the obligation of maintaining a constant supply. And the company then wanting more protection for themselves than was afforded by the ball-cock, procured the insertion in the Act of s. 6. That section enables them to provide the additional security against waste afforded by the screw-down valve, but only to provide it at their own expense. The mere fact that the valve is to be inserted in the consumer's pipe does not shew that the consumer is to pay for it. I can see nothing in that section compelling the consumer to put down or pay for these stop-valves; and the provisions of the earlier Act cannot be enlarged to meet the altered condition of things brought about by the later Act. It seems to me, therefore, that the justices in this case have erred, and that the company having unlawfully cut off the water are liable to a penalty.

Case remitted to justices.

Solicitors for appellant: *Law & Worssam.*
Solicitors for respondents: *A. R. & H. Steele.*

J. F. C.

REG. *v.* THE JUSTICES OF THE COUNTY OF LONDON. 1889

Dec. 12.

Licensing Acts—Provisional Licence—Premises "about to be constructed"—Renewal—Appeal against refusal to renew—Licensing Act, 1874, 37 & 38 *Vict. c.* 49, *s.* 22—*Licensing Act*, 1828, 9 *Geo.* 4, *c.* 61, *s.* 27.

By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 22, where premises are about to be constructed for the purpose of being used for the sale of intoxicating liquors to be consumed on the premises, the licensing justices, if satisfied with the plans of such premises submitted to them, may make a provisional grant of a licence in respect of such premises, such grant to be of no validity until declared to be final by an order of the licensing justices. The provisional grant of a licence shall be subject to the same conditions as to the giving of notices and generally as to procedure as if such grant were not provisional, &c.:—

Held, first, that a provisional licence granted under s. 22 is capable of renewal, and may be renewed although the premises have been completed, and an application to the justices for an order declaring the licence final has been made and refused; secondly, that an appeal lies to quarter sessions against the refusal of the justices to renew such provisional licence.

RULE nisi for a certiorari to bring up, for the purpose of quashing them, orders made by the sessions for the County of London on appeal against the refusal to grant the renewal of a provisional licence for the sale by retail of intoxicating liquors on or off the premises, at a house to be called the Three Horseshoes.

It appeared that in 1886 a provisional grant and order of confirmation of a licence in respect of premises to be erected upon a new site had been granted by the licensing justices under 37 & 38 Vict. c. 49, s. 22. (1)

(1) 37 & 38 Vict. c. 49 (Licensing Act, 1874), s. 22: "Any person interested in any premises about to be constructed or in course of construction for the purpose of being used as a house for the sale of intoxicating liquors to be consumed on the premises may apply to the licensing justices and to the confirming authority for the provisional grant and confirmation of a licence in respect of such premises; and the justices and confirming authority, if satisfied with the plans submitted to them of such house, and that if such premises had been actually constructed in accordance with such plans they would, on application, have granted and confirmed such a licence in respect thereof, may make such provisional grant and order of confirmation accordingly.

"A provisional grant and order of confirmation shall not be of any validity until it has been declared to be final by an order of the licensing justices made after such notice has

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In 1888, the persons interested in the site applied for a renewal of such provisional grant and confirmation.

The justices refused to renew the provisional licence on the ground of delay in erecting the public-house.

On appeal to quarter sessions against the refusal to renew the provisional licence the sessions reversed the decision of the justices and renewed the licence.

At the annual licensing meeting on 5th March, 1889, the applicants, having erected the public-house, applied to the licensing justices for a final order under s. 22 of the Licensing Act, 1874. The justices refused to grant the final order on the ground that they were not satisfied that the house had been completed in accordance with the plans.

The applicants thereupon applied to the justices to renew the provisional licence in order to enable them to make such alterations in the house as would make it in substantial accordance with the plans. The justices refused this application. On appeal to quarter sessions, heard on 27 April, 1889, the Court reversed the decision of the justices, and renewed the provisional licence to the appellants to enable them to alter the building so as to bring the same into reasonable accord with the plans.

Poland, Q.C. (*Forrest Fulton*, and *R. D. Muir*, with him) shewed cause. Formerly a licence would only be granted in respect of a house actually constructed. But by 37 & 38 Vict. c. 49 (Licensing Act, 1874), s. 22, a provisional licence in respect of

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been given as may be required by the justices at a general annual licensing meeting or a special sessions held for licensing purposes. Such declaration shall be made if the justices are satisfied that the house has been completed in accordance with such plans as aforesaid, and are also satisfied that no objection can be made to the character of the holder of such provisional licence.

"A provisional grant and confirmation of a licence shall be subject to the same conditions as to the giving of notices, and generally as to procedure to which such grant and confirmation would be subject if they respectively were not provisional, with this exception, that where a notice is required to be put up on the door of a house such notice may be put up in a conspicuous position on any part of the premises. This section shall, with the necessary variations, extend to the provisional removal to any premises of an existing licence under s. 50 of the principal Act."

premises about to be constructed may be granted and confirmed by justices if satisfied with the plans. A provisional grant and confirmation is subject to the same conditions as to procedure as if it was not provisional. It follows that the holder of the provisional licence has the right of appeal conferred by 9 Geo. 4, c. 61, s. 27, i.e., a right of appeal to quarter sessions against the refusal of the licensing justices to renew the provisional licence. [Other points were taken and argued which it is unnecessary to report.]

Bompas, Q.C., and *Woollett*, in support of the rule. The decision of the licensing justices was final, and there was no right of appeal. A provisional licence is not limited to a year, like an ordinary licence, and is not renewable, but continues until the house is completed, or the justices decide that it is not constructed in accordance with the plans, and thereupon the licence comes to an end. The justices had no power to renew it. But even if they had power there is no appeal from their refusal to renew. The application for a renewal after such a decision was an indirect mode of obtaining an appeal in a case where no appeal is provided by the Acts. Sect. 27 of 9 Geo. 4, c. 61, does not apply.

LORD COLERIDGE, C.J. I have not throughout the argument entertained any serious doubt that in this case there is an appeal to quarter sessions, and that the rule for a certiorari should be discharged. The important section is s. 22 of 37 & 38 Vict. c. 49. The section gives to the owner who builds a house to be licensed a protection which theretofore he had not, because if, before building, he has satisfied the licensing authority that the proposed building is fit, and a provisional order has been granted and confirmed, he may safely go on to build, and the justices "shall" make a final order on being satisfied that the house is erected in accordance with the plans and the owner is a fit person. The questions before us are, first, may this provisional licence, like other licences under the Acts, be renewed from year to year as time runs on and the protection of a provisional licence is required? If it may, and it is a licence in the ordinary sense of the word, and subject to the ordinary provisions, then 9 Geo. 4,

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Lord Coleridge, C.J.

c. 61, s. 27, which, as to renewals, is still in force, and enacts that there shall be an appeal by "any person who shall think himself aggrieved by any act of any justice," applies to the act of these justices in refusing to renew the provisional licence under the circumstances of this case. The second question, so far as I understand it, is whether the time that has elapsed prevents the application for renewal of the provisional licence? As to the first point, the words of the Act seem to me to sanction, indeed to direct the construction which I have put upon them, and the just intention of the Act can only be effected by that construction. The words are that the justices may make a "provisional grant of a licence,"—not "provisionally grant a licence,"—that is to say, may grant a licence subject to two conditions, viz., that the house shall when completed be in accordance with the plans which they have sanctioned, and that a fit person is the holder of the licence. Those are the only two conditions on the failure of which the justices can object to make the provisional licence final. If it had been an ordinary licence granted for a year, then s. 27 of 9 Geo. 4, c. 61, being kept in force, it is clear that on the refusal to renew there would have been an appeal to quarter sessions. It is admitted that there is an appeal as to the vested interest created in a house built and licensed, but it is said that in respect of the vested interest created on the assent of the justices in respect of a house about to be built there is no appeal, and that such vested interest, however large, and although created on the pledged faith of the justices themselves, may be destroyed by the same justices without any appeal. It is clear on the Act that we give full effect to the true meaning of the legislature in saying that the word "licence" is used in the same sense as regards appeal in the sections relating both to ordinary and provisional licences, and where there is a provisional licence there is an appeal against a refusal to renew, as there is in respect of a licence once finally granted. Then it was argued that it was too late, because, under the circumstances, the provisional licence was gone for want of renewal, or because the time for which it was granted had elapsed, and there was now a completed building. But it has been decided expressly that it is not too late after the term of a licence has run out to apply for a renewal of the licence.

It was also argued that the licence, although in the common form used in many parts of England, is good for nothing, because, being on the face of it granted for a year, if the house is not built in that time, although ex necessitate rei a longer time would be required for the building, the provisional licence expires and cannot be renewed. I fail to see any basis for that argument. There is nothing in the Act, no decision, nor principle making void the protection given by s. 22. If there could be but one provisional licence, and but one termination to it, viz., a final order, and the justices might in their discretion refuse that order for the smallest deviation from the plans, and there could be no renewal of a provisional licence, the parties who have spent large sums of money in building on the faith of it are absolutely at the discretion of the justices, and without appeal.

I think this is a licence to be granted for such time as the justices think fit, and if it requires renewal it may be renewed like other licences, subject to the appeal given by 9 Geo. 4, c. 61, which applies to other licences.

MATHEW, J. I am of the same opinion. I was glad to hear from the junior counsel for the applicants that when the case came before the justices they did, at first, proceed on the assumption that alterations could be made in the structure which would justify them in declaring the licence to be final. They seem, however, to have yielded to the argument that they were not permitted by the statute to act on their first view; but when the case goes back to them they may consider the provision that the building is to be "in accordance with the plans," to mean "in substantial accordance" with the plans. A departure from the plans will not divest the justices of their power to sanction so long as the building is substantially that which was originally proposed to be erected.

Rule discharged with costs.

Solicitor for applicants: *E. M. Hill.*
Solicitors for defendants: *Clapham & Fitch.*

J. R.

1890 SHOOLBRED & CO., APPELLANTS; THE JUSTICES OF ST. PANCRAS, RESPONDENTS.

Jan. 30.

Licensing Acts—Licence to Deal in Game—Disqualification—Sale of Beer by Retail—Additional Licence for Sale of Beer—1 & 2 Wm. 4, c. 32, s. 18—4 & 5 Wm. 4, c. 85, s. 19—26 & 27 Vict. c. 33, s. 1.

The holder of an additional licence to sell beer under 26 & 27 Vict. c. 33, s. 1, is a person "licensed to sell beer by retail" within the meaning of s. 18 of the Game Act, 1831 (1 & 2 Wm. 4, c. 32), and is therefore disqualified from holding a licence to deal in game under that section.

CASE stated under the Summary Jurisdiction Acts, from which the following facts appeared:—

By s. 18 of the Game Act, 1831 (1 & 2 Wm. 4, c. 32), justices are empowered to grant licences to deal in game to householders or keepers of shops, not being (inter alia) "licensed to sell beer by retail."

The appellants, who carried on business at Tottenham Court Road, and in various premises adjoining, including two houses in Grafton Street, applied to the respondent justices under that section for a licence to deal in game to be granted to one of their managers; it was proposed that game should be dealt in on the premises in Grafton Street.

At the time of the application the appellants were the holders of a licence under 26 & 27 Vict. c. 33, s. 1, to sell beer in bottles to be drunk off their premises.

The appellants contended that as they were only licensed to sell beer under the last-mentioned section, they were not "licensed to sell beer by retail" within the meaning of s. 18 of the Game Act.

The respondents were of opinion that the possession of a licence under 26 & 27 Vict. c. 33, s. 1, precluded the holder from obtaining a licence to deal in game under s. 18 of the Game Act.

The question for the opinion of the Court was whether the decision of the respondents was right.

Grain, for the appellants. The object of the Game Act was the prevention of poaching and the dealing in poached game by

compelling dealers in game to take out a justices' licence, and s. 18 (1) of that Act disqualifies certain persons, including innkeepers, victuallers, and persons licensed to sell beer by retail, from holding such a licence. The expression "licensed to sell beer by retail" must be interpreted with reference to the licensing laws in force when the Game Act was passed. At that time the granting of beerhouse licences was regulated by 11 Geo. 4 and 1 Wm. 4, c. 64, under which beerhouse licences might be granted to resident occupiers; that statute was subsequently amended by 4 & 5 Wm. 4, c. 85, which by s. 19 defines a selling of beer by retail to be a sale in any less quantity than four gallons and a half, and the holder of a beerhouse licence under these statutes would fall within the disqualification imposed by s. 18 of the Game Act. The appellants, however, have no such licence, but are the holders of a grocer's licence (2) under s. 1 of 26 & 27 Vict. c. 33, enabling them to sell beer in bottles in less quantities than had previously been the case, and are therefore not within the exception in s. 18 of the Game Act. The case of *Jones* v. *Bone* (3) is in favour of the appellants' contention; it was there held that, where a grantee in fee of a piece of building land had covenanted with the grantor that the trade of a "seller by retail of wine, beer, spirits, or spirituous liquors," should not be carried on upon the same, the sale of wine and spirits in bottle by a grocer was not such a breach of the covenant

(1) 1 & 2 Wm. 4, c. 32, s. 18, empowers justices to grant to "any person being a householder or keeper of a shop or stall, ... and not being an innkeeper or victualler, or licensed to sell beer by retail, ... nor being in the employment of any of the above-mentioned persons, a licence . . . . empowering the person to whom such licence shall be so granted to buy game at any place from any person who may lawfully sell game by virtue of this Act, and also to sell the same at one house, shop, or stall only kept by him. . . . ."

(2) By 26 & 27 Vict. c. 33, s. 1: "From and after the passing of this Act, any person who, in England or Ireland, shall have taken out an excise licence to sell strong beer in casks containing not less than four and a half gallons, or in not less than two dozen reputed quart bottles at one time, to be drunk or consumed elsewhere than on his premises, may take out an additional licence on payment of the Excise duty, ... and the same shall authorize such person to sell beer in any less quantity and in any other manner than as aforesaid, but not to be drunk or consumed on the premises where sold. . . . ."

(3) Law Rep. 9 Eq. 674.

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as the Court of Chancery would interfere with; and equally the sale by him of beer in bottle would not have made him a seller by retail of beer within the meaning of the covenant.

Bodkin, for the respondents, was not called upon to argue.

FRY, L.J. (1) I am of opinion that the decision of the justices was right and must be affirmed. The question turns upon the true construction of the Act of 1831, by which authority was given to justices to grant to persons not coming within certain named exceptions licences to buy and sell game; among the excepted persons to whom such licences are not to be granted are persons who hold licences to sell beer by retail. Now at the time this Act was passed the law as regards licensing was in this condition. There were the ordinary victualler's or innkeeper's licences, generally called full licences, and there were in addition licences under the Act of 1830, by which licences for the sale of beer, or beerhouse licences, might be granted to resident occupiers. This being the state of things, the legislature, in excepting certain classes of persons from the right to obtain game licences, did not do so by reference to the Act of 1830, but did it in general language, the prohibition being imposed on persons holding licences to sell beer by retail. In my opinion the true meaning of those words is this: they include all persons licensed to sell beer by retail according to the law from time to time and for the time being in force, and they are not confined to the holders of licences granted to resident occupiers under the Act of 1830; the words are too general to bear the latter construction. Since that time various modifications of the old forms of licence have been introduced by the legislature, and the appellants are the holders of a licence to sell beer by retail granted to them under the provisions of subsequent statutes. But whatever be the particular statute under which they hold their licence there is no doubt that the appellants have a licence to sell beer, and to sell it by retail, and in my judgment they come within the exception contained in the statute of 1831; not merely is the express language of the exception sufficient to cover them,

(1) Sitting as Judge of a Divisional Court.

but the whole meaning and intention of the statute point to the same conclusion.

On behalf of the appellants the case of *Jones* v. *Bone* (1) was cited to us; but it is by no means a conclusive authority on the point for decision. It was a suit in the Court of Chancery before the then Vice-Chancellor James, in which the grantee of a certain piece of building land covenanted with the grantor that the land should not be used for twenty years as the site for any hotel, tavern, publichouse, or beerhouse, nor should the trade (inter alia) of a seller by retail of wine, beer, spirits, or spirituous liquors be carried on upon it during that term. The actual occupier in that case was a grocer, who was in the habit of selling wine and spirits in the course of his trade under a grocer's licence, and the question in the case was whether the trade of selling wine and spirits by retail was carried on by him. James, V.C., was of opinion that the facts did not bring the case within the meaning of the covenant; that there was a well-known trade against which the covenant was directed, and that it was not directed against that carried on by the occupier. That decision in no way covers the present case, and I am clearly of opinion that the decision of the justices must be affirmed.

MATHEW, J. I am entirely of the same opinion. What is said in subsequent licensing Acts cannot affect the provisions of this Act. It is true that since this Act was passed the number of persons holding licences has largely increased, and that the provisions with regard to licensing have been in some respects altered; but we have now only to construe this Act of Parliament, and I see no reason to doubt that the appellants come within the description contained in the exception, and that the decision of the justices was right.

Judgment for the respondents.

Solicitors for appellants: *G. H. Barber & Son.*
Solicitors for respondents: *Scadding & Bodkin.*

(1) Law Rep. 9 Eq. 674.

W. J. B.

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Feb. 3.

FAIRCLOUGH, Appellant; ROBERTS, Respondent.

Licensing Acts—Sale of Beer by Retail—Excise Licence to sell Beer in Wholesale Quantities—Sale of prescribed Quantity in pint Bottles—6 Geo. 4, c. 81, s. 2—4 & 5 Wm. 4. c. 85, s. 19—26 & 27 Vict. c. 33, s. 1—Licensing Act, 1872 (35 & 36 Vict. c. 94), ss. 3, 74.

The appellant held an excise licence under 6 Geo. 4, c. 81, s. 2, for the sale of beer in casks containing not less than four and a half gallons or in not less than two dozen reputed quart bottles at one time; he did not hold a licence under 26 & 27 Vic. c. 33, s. 1, which enables the holder of such an excise licence to take out an additional licence for the sale of beer "in any less quantity and in any other manner than as aforesaid."

He sold beer in pint and half-pint bottles, but the quantity thus sold at one time was not less than the amount which a cask of four and a half gallons or two dozen reputed quart bottles would contain.

The appellant having been convicted upon a summons under s. 3 of the Licensing Act, 1872, of having sold beer by retail without a licence :—

Held, that the test of a sale of beer by retail was the quantity sold at any one time, and that the conviction was wrong.

Case stated by justices, upon appeal against a conviction under the Licensing Act, 1872.

An information having been preferred by the respondent against the appellant, a summons was issued under s. 3 of the Licensing Act, 1872, charging the appellant with having unlawfully sold by retail (viz., in less quantity than four and a half gallons in cask or two dozen reputed quart bottles at one time or in other manner than last aforesaid) beer to be consumed off the premises, without having a certificate authorizing him so to do.

The appellant, a grocer, was the holder of an excise licence under 6 Geo. 4, c. 81, s. 2, which licence empowered him to sell strong beer only in casks containing not less than four and a half gallons imperial standard gallon measure, or in not less than two dozen reputed quart bottles at one time, to be drunk or consumed elsewhere than on his premises. Upon the hearing of the summons it was proved and found as a fact, that the appellant sold beer in other manner than that specified in 6 Geo. 4, c. 81, s. 2, that is to say, that he sold beer in pint bottles and half-pint bottles, but that the quantity of beer thus sold at one time was

not less than the amount which a cask of four and a half gallons imperial standard gallon measure or two dozen reputed quart bottles would contain. It was also found as a fact, that the appellant had not obtained an additional excise licence under the Inland Revenue Act, 1863 (26 & 27 Vict. c. 33, s. 1), which authorizes the holder of a licence under 6 Geo. 4, c. 81, s. 2, to take out an additional licence for the sale of beer in any less quantity and in any other manner than as specified in that Act.

The justices were of opinion that the appellant could not lawfully sell beer in pint and half-pint bottles without an additional licence under 26 & 27 Vict. c. 33, s. 1, and that the case fell within s. 3 of the Licensing Act, 1872, the appellant not having a licence to sell beer in a less quantity or in any other manner than that prescribed by 6 Geo. 4, c. 81, s. 2, and they convicted the appellant.

Henn Collins, Q.C., and *J. W. Mansfield*, (*Besley*, with them), for the appellant. The quantity sold at one time is the test of a sale of beer by retail, and the only offence that can be committed by a person charged with selling beer by retail without a licence is the selling of less than the quantity fixed by the statute. By s. 74 of the Licensing Act, 1872, a sale by retail is defined as meaning the sale in such quantities as is declared to be sale by retail by any Acts relating to the sale of intoxicating liquors, and in s. 19 of the Beerhouse Act, 1834 (4 & 5 Wm. 4, c. 85), it is enacted that every sale of beer, cyder, or perry, in any less quantity than four gallons and a half, shall be deemed and taken to be a selling by retail; the quantity sold, and not the size of the measure in which it is sold, is therefore clearly the standard of a sale by wholesale or retail. It was unnecessary for the appellant to take out an additional licence under 26 & 27 Vict. c. 33, s. 1, which is an enabling section only, and does not cut down pre-existing rights or create a new offence. If an offence has been committed under 6 Geo. 4, c. 81, s. 2, by selling the prescribed quantity in pint, instead of in quart bottles, that is a question for the Excise authorities, and is not ground for a prosecution under the Licensing Acts.

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Bryn Roberts, for the respondent. The conviction was right. The appellant was bound to have had an additional licence under 26 & 27 Vict. c. 33, s. 1. The language of that section is explicit; it is not merely "in any less quantity," but also "in any other manner;" and therefore if the appellant wanted to sell the proper quantity of bottled beer in any other manner than in two dozen reputed quart bottles, that is to say, in pint or half-pint bottles, he could only have done so by virtue of a licence granted under that section.

POLLOCK, B. It seems to me that it is impossible to sustain this conviction. In proceedings of this kind it is not sufficient to produce an inferential argument from one series of Acts to another series under which a man might be liable to be convicted; the question is whether the actual conviction is right. The point raised in this case is not a mere matter of form; the prosecutor did not intend simply to question the form of the licence, but to raise the question whether the appellant has committed a specific offence created by a specific Act of Parliament. That Act is the Licensing Act, 1872, by s. 3 of which it is made an offence to sell by retail any intoxicating liquor without being duly licensed to sell the same; and the simple question for us is whether the appellant sold beer by retail. To see the meaning of this phrase we must look at s. 74 of the same Act, in which "sale by retail" is defined to mean the sale of intoxicating liquor in such quantities as is declared to be sale by retail by any Acts relating to the sale of intoxicating liquors. Now the only statute which has been referred to in argument as explaining the phrase "sale by retail" is 4 & 5 Wm. 4, c. 85, which enacts by s. 19 that every sale of beer in any less quantity than four gallons and a half shall be deemed to be a selling by retail. In the present case the quantity of beer sold by the appellant was considerably over the prescribed quantity of four and a half gallons; his contract was for the sale at one time of a much larger quantity, and I do not think that such a sale brings him within the provisions of s. 3 of the Act of 1872. There seems to me to be no possible doubt as to the proper construction of the section. It is unnecessary to go into any

argument founded on the Act of 1825. Our decision seems not only to properly interpret the language of the Act, but also to be consonant with good reason; for it would be wrong to make that an offence which was not one when the Act was passed simply because it is now the fashion to sell beer in smaller bottles than was then the custom. I do not inquire whether the appellant has committed an offence under the Excise Acts, for it is only with the Licensing Act, 1872, that we have to deal.

HAWKINS, J., concurred.

Conviction quashed.

Solicitor for appellant: *H. Clifford Gosnell.*

Solicitors for respondent: *Winter & Co., for Owen & Roberts. Bangor.*

W. J. B.

PAIN, APPELLANT; BOUGHTWOOD, RESPONDENT.

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Jan. 28.

Adulteration—Scienter—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.* c. 63), *s.* 9.

By s. 9 of the Sale of Food and Drugs Act, 1875, "No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration under a penalty in each case not exceeding 20*l.*":—

Held, that a person selling the altered article could be convicted under that section although at the time he sold it he did not know of the alteration.

CASE stated under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, by one of the Metropolitan Police Magistrates.

The respondent, a milk seller in the parish of St. Mary, Islington, was summoned before the magistrate upon a complaint made by the appellant, a sanitary inspector to the vestry of the same parish, for having sold an article of food—to wit, milk—in its altered state, without notice or making disclosure of the alteration, from which milk 28 per cent. of its original fat had been abstracted, so as to affect injuriously its quality, substance, or nature, contrary to the provisions of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 9.

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It was proved at the hearing of the summons that the appellant purchased at the shop of the respondent a pint of milk which was duly divided into three parts, one of which was sent to the public analyst.

The certificate of the analyst was produced, and it stated that 28 per cent. of its original fat had been abstracted from the sample sent to him, so as to affect injuriously its quality, substance, or nature, and that no change had taken place in the constitution of the article which would interfere with the analysis.

No evidence was given that the person selling the milk had knowledge of the alteration. The respondent gave evidence that he had no knowledge of any such alteration in the milk, and his daughter, who managed the shop and sold the milk, denied all knowledge of any alteration.

The magistrate was of opinion that, as s. 9 of the Sale of Food and Drugs Act, 1875, contemplated disclosure by the seller of the alteration of any article of food, it was necessary to prove knowledge by the defendant, or his agent, of such alteration, and he therefore dismissed the summons.

The question for the opinion of the Court was whether this decision was right.

R. V. Austin, for the appellant. Knowledge by the seller of the alteration in the article of food sold is not a necessary ingredient in the offence contemplated by s. 9 of the Sale of Food and Drugs Act, 1875. Where knowledge is a necessary ingredient the statute specifically says so; see ss. 3, 4, and 5. The possible hardship to a person, who innocently buys the milk by retail in order to sell it again, is removed by s. 25, which enables him to protect himself by obtaining a written warranty from the retail seller. *Betts* v. *Armstead* (1), though the decision was upon s. 6, really covers this case.

[CHARLES, J. The offence under s. 9 is selling without disclosing the alteration. How can a man disclose that which he does not know? Under s. 6 it seems to be different; there the seller has the matter in his own hand.]

(1) 20 Q. B. D. 771.

He must put himself in a position to know of the alteration, or he must obtain a written warranty under s. 25. *Core* v. *James* (1), was decided under 6 & 7 Wm. 4, c. 37, and has no application here. Where want of knowledge is a defence, as it is under ss. 3 and 4 of the Act of 1875, the penalty imposed is much heavier than under ss. 6 and 9, shewing that the legislature intentionally says nothing about want of knowledge in the two latter sections. This consideration was pointed out as regards s. 6 by A. L. Smith, J., in *Betts* v. *Armstead* (2), and it applies equally to s. 9, which provides the same penalty. *Lane* v. *Collins* (3) is not against the construction which it is contended should be given to s. 9. The information was under s. 6, and the decision turned upon whether "milk," as a term of the trade, necessarily meant milk from which the cream had not been abstracted.

He also referred to *Cundy* v. *Le Cocq.* (4)

No counsel appeared for the respondent.

GRANTHAM, J. We both regret that no counsel has appeared for the respondent, but, speaking for myself only, I have no doubt at all that our judgment ought to be for the appellant. Looking at the course which legislation has taken upon this subject, it appears that, prior to the passing of the Act of 1875, difficulties had arisen under the earlier Acts in consequence of it not being clear when absence of knowledge was a defence to a charge of adulteration, and when it was not. The legislature thought it necessary to clear up the matter by passing the Act of 1875, which incorporated the law on this subject. First of all, that Act deals with cases of the adulteration of articles of food and drugs by adding to or mixing with them some other substance; and having regard to previous decisions, and to the difficulties which had arisen, the legislature thought fit to enact the special provisions of s. 5, which enacts that no person shall be liable to be convicted of an offence under ss. 3 or 4 (which deal with adulteration or the sale of adulterated articles) if he

(1) Law Rep. 7 Q. B. 135.
(2) 20 Q. B. D. 771.
(3) 14 Q. B. D. 193.
(4) 13 Q. B. D. 207.

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Grantham, J.

shews to the satisfaction of the justice or court before whom he is charged that he did not know of the article of food or drug sold by him being so adulterated, and that he could not with reasonable diligence have obtained that knowledge. Then comes s. 6, which makes it an offence to sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, and four instances are specifically mentioned in which the purchaser shall not be deemed to have committed an offence under that section, absence of knowledge not being one of those instances. Then, being fully aware of what the result would be, s. 9 is enacted, which is aimed, first, at any person who, with the intent that the same may be sold in its altered state without notice, abstracts from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and, secondly, at the person who sells the article so altered without making disclosure of the alteration. But for the provisions of the second part of the section, the first part would be useless as a protection to the public. The Legislature, however, saw that the provisions of the second part might have serious consequences to the person who sold the article so altered, and by s. 25 the seller is given a power of protecting and exonerating himself by obtaining a written warranty from the person who has supplied the article to him. In the present case the respondent ought to have provided himself with a written warranty, and then he could have handed it over to the inspector, who could have thereupon proceeded against the person who had actually committed the fraud. If that course is not taken, the legislature assumes that the seller has been a party to what has been done. Every precaution is taken in the statute to enable a person honestly selling the article without knowledge of the alteration to defend himself against a charge made under s. 9.

I am, therefore, of opinion that the magistrate was wrong in deciding that knowledge by the respondent of the alteration which had been made in the milk was a necessary ingredient in the offence specified in s. 9; and this case must be sent back with that expression of the opinion of the Court.

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CHARLES, J. I think that this case is concluded by *Betts* v. *Armstead* (1); though, but for that decision, I should have entertained some doubt on the point before us. *Core* v. *James* (2) certainly points in the direction of mens rea being necessary to constitute the offence. I do not, however, feel myself at liberty to follow *Core* v. *James*. (2) That case was considered by the Court in *Betts* v. *Armstead* (1), and the judges held that there was no necessity to shew guilty knowledge under s. 6 of the Act of 1875. I think we must follow the latter case as being a judicial exposition of the meaning of the Act.

Case remitted accordingly.

Solicitor for the appellant: *W. Lewis.*

W. A.

[CROWN CASE RESERVED.]

1889

Nov. 2.

REG. *v.* BROWN.

Criminal Law—Attempt to commit Unnatural Offence—Domestic Fowls—Question of Law arising on the Trial—Jurisdiction of Court for Crown Cases Reserved—11 & 12 *Vict. c.* 78. *s.* 1—24 & 25 *Vict. c.* 100, *s.* 61.

The prisoner pleaded guilty at assizes to an indictment charging him with having attempted to commit unnatural offences with domestic fowls, and was sentenced to a term of imprisonment. After the judge left the assize town his attention was called to an unreported case which was said to have decided that a duck was not an "animal" within the meaning of 24 & 25 Vict. c. 100, s. 61, and he thereupon stated a case, requesting the opinion of the Court for Crown Cases Reserved whether the conviction was good:—

Held, that the objection to the indictment was a question which had arisen at the trial so as to give the Court for Crown Cases Reserved jurisdiction, under 11 & 12 Vict. c. 78, s. 1, to entertain the case.

Held, also, that the indictment was good, and that the prisoner was properly convicted.

Reg. v. *Collins* (L. & C. 471; 33 L. J. M. C. 177) and *Reg.* v. *Dodd* (decided in 1877 and unreported) overruled.

Reg. v. *Clark* (Law Rep. 1 C. C. R. 54) discussed and distinguished.

CASE stated for the opinion of the Court by Lord Coleridge, C.J., as follows:—

The prisoner was convicted before me upon his own confession at the last assizes for the county of Essex, on an indictment

(2) 20 Q. B. D. 771. (3) Law Rep. 7 Q. B. 135.

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charging him with an attempt to commit unnatural offences with domestic fowls. The depositions shewed that in all probability the offence had been habitual with him, and had resulted in the death of several of the birds, and serious injury to several others, who were found torn and bleeding apparently from the effects of the attempted penetration.

On his confession I sentenced him to twelve months' imprisonment with hard labour. Afterwards I was informed that the Court of Criminal Appeal in an unreported case had unanimously held that a duck was not an animal within 24 & 25 Vict. c. 100 s. 61.

If I had been aware of that decision it would have been my duty to defer to it, whatever my own opinion on the matter might be. In the present case, however, there exists a conviction which, if the case of *Reg.* v. *Dodd* (1) is to be followed, must be quashed. I request the opinion of the Court of Criminal Appeal whether it should be affirmed or quashed. I think it right, however, to call the attention of the Court to the case of *Reg.* v. *Clark.* (2)

No counsel appeared before the Court for Crown Cases Reserved.

LORD COLERIDGE, C.J. Although we have not had the assistance of counsel in this case, we have had an opportunity of fully discussing it. [His Lordship stated the facts set out in the case.] My attention having been called to the case of *Reg.* v. *Dodd* (1) after I left the assize town, I thought it was my duty to make inquiry with respect to it. It turned out to be a case decided by this Court in 1877, and it is unreported. The question reserved for the consideration of the Court was whether a duck was an animal within 24 & 25 Vict. c. 100, s. 61. The Court quashed the conviction, and it was not unreasonable to suppose that they had quashed it upon the ground that a duck was not an animal within the statute. It is fortunate, however, that several of the judges who composed the Court are still amongst us, and having made inquiry, we understand that the conviction was quashed, not upon the ground that a duck was not an animal within the statute, but upon another ground. In *Reg.* v. *Collins* (3) the

(1) Unreported. (2) Law Rep. 1 C. C. R. 54.
(3) L. & C. 471; 33 L. J. M. C. 177.

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Court held that, where a man put his hand into another's pocket and there was nothing in the pocket which he could steal, he could not be convicted of an attempt to steal. That is a decision with which we are not satisfied. *Reg.* v. *Dodd* (1) proceeded upon the same view that a person could not be convicted of an attempt to commit an offence which he could not actually commit. Some of the judges, I know, yielded with great reluctance to the authority of *Reg.* v. *Collins* (3), and thought that decision was wrong. In this case it would seem on the question of fact that the ground of the decision in *Reg.* v. *Dodd* (1) fails, because I should suppose it is obvious that as a fact the offence could be committed by the boy. We are all, therefore, of opinion that *Reg.* v. *Dodd* (1) is no longer law. It was decided on the authority of *Reg.* v. *Collins* (2), and that case, in our opinion, is no longer law.

That view does not, however, exhaust the difficulties of this case. In *Reg.* v. *Clark* (3) the prisoner pleaded guilty, but the evidence on the depositions did not make out any offence. The decision was that of a strong Court, which seems to have held that because he pleaded guilty, and pleaded guilty to that which, if he had known it, was not an offence, and not supported by any evidence of an offence, nevertheless he must be taken to have known the law, and his plea of guilty estopped him from afterwards disputing the conviction. Cockburn, C.J., delivered a very short judgment, saying: "In this case we have no jurisdiction. It was not a question arising on the trial, for the man pleaded guilty, and he must be taken to know the law. The power to state a case for the consideration of this Court only applies to questions of law which arise at the trial." (4)

If is intended by that judgment that because a man pleads

(1) Unreported.

(3) Law Rep. 1 C. C. R. 54.

(2) L. & C. 471.

(4) See 11 & 12 Vict. c. 78, s. 1, which enacts that, "when any person shall have been convicted of any treason, felony, or misdemeanor before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner, or justices of the peace before whom the case shall have been tried, may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the Exchequer;" (now the Court for the Consideration of Crown Cases Reserved).

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guilty, any difficulty with respect to the statement of the case against him is immaterial, that he is absolutely concluded for ever after from taking any point upon it, and that the judge who tries him cannot state a case for the opinion of this Court, we respectfully differ from that view, and inasmuch as the prisoner in the present case was indicted, and the indictment was read to him, and he might then have taken the objection, we think the objection was in effect taken. The point was there existing, it might have been taken, and it was a point which, in our view, did arise at the trial. We think, therefore, that this Court has jurisdiction to entertain the case, and we think it notwithstanding *Reg.* v. *Clark.* (1) It is to be observed that that case is not directly in point, because there the indictment was good, though the facts stated in the depositions did not support it. The prisoner having pleaded guilty to the indictment the Court thought that the point did not arise at the trial. The distinction in the present case is that the objection was not as to the sufficiency of proof, but arose upon the indictment itself. It was an objection which might have been taken without the proof being gone into. We should not have shrunk from differing from the decision in *Reg.* v. *Clark* (1) if that case had been directly in point. It is not, and therefore we do not actually differ from it.

We are of opinion, first, that we have jurisdiction to entertain this case, and, secondly, that upon the facts, and clearly upon the general law, the boy was properly convicted upon his own confession of an attempt to commit an unnatural offence.

It follows that the conviction must be affirmed.

The rest of THE COURT (Pollock, B., Field, Manisty, Cave, Day, and Grantham, JJ.) concurred.

Conviction affirmed.

(1) Law Rep. 1 C. C. R. 54.

W. A.

MAYOR *v.* COLLINS. 1890 *Feb.* 7.

Practice—Infant—Discovery—Interrogatories—Order XVI., *rr.* 16, 21, *Order* XIX., *r.* 13, *Order* XXXI., *Order* XXXII., *Order* XXXIV., *r.* 4.

An infant plaintiff or defendant cannot be compelled to answer interrogatories.

APPEAL against the order of a master made in an action for libel, giving the defendant leave to deliver interrogatories for the examination of the plaintiff, an infant suing by his next friend. Pollock, B., referred the matter to the Court.

Aspland, Q.C. (with him *W. B. Odgers*), for the plaintiff. The order ought not to have been made. An infant plaintiff or defendant cannot be compelled to answer interrogatories. According to Order XVI., r. 16, the one is to sue by his next friend, the other is to defend by his appointed guardian "in the manner heretofore practised in the Chancery Division." It is stated in Daniell's Chancery Practice, 6th ed., vol. ii., pt. 1, p. 1812, that "as infants and persons of unsound mind are incapable of making admissions, interrogatories should not be delivered for their examination." The passage is shewn to be accurate by the judgments or dicta of Lord Erskine in *Lucas* v. *Lucas* (1), Lord Langdale in *Holden* v. *Hearne* (2), Lord Cairns in *United States of America* v. *Wagner* (3), and Lord Manners in *Savage* v. *Carroll* in the Irish Court of Chancery. (4) There is no reported case in which an order either for interrogatories, or for an affidavit of documents, appears to have been made in Chancery against an infant plaintiff or defendant. The other rules, viz., Order XVI., r. 21, Order XIX., r. 13, and Order XXXIV., r. 4, which deal with the mode of trial in proceedings to which infants are parties, are equally founded on the practice in Chancery before the Judicature Acts.

In *Dyke* v. *Stephens* (5) it was held that the next friend of an infant plaintiff could not be called upon for an affidavit of documents, and in *Ingram* v. *Little* (6) that the guardian ad litem of a lunatic could not be interrogated. If the legal representatives

(1) 13 Ves. 274.
(2) 1 Beav. 445.
(3) Law Rep. 2 Ch. 582.
(4) 1 Ball & B. 550.
(5) 30 Ch. D. 189.
(6) 11 Q. B. D. 251.

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of parties under disability possess this immunity, it would seem to follow that the parties under disability must themselves possess the same immunity. [He also referred to *Rhodes* v. *Swithenbank*. (1)]

Hansell, for the defendant. There was jurisdiction to make the order. The plaintiff can be compelled, notwithstanding his infancy, to give evidence at the trial. It is difficult to see on what principle he cannot equally be compelled to answer interrogatories. There is no case which precisely defines the practice of the Court of Chancery before the Judicature Acts in the particular matter. The cases cited only shew that where the guardian of an infant defendant was interrogated on a bill in equity, the practice was to consider admissions made by the guardian as not binding on the infant. The ground of this practice must have been the fact that these admissions were not made by the infant himself, and the Court might consistently with it have held that admissions made by an infant himself in an action were binding on him. This view seems to have been suggested by M'Mahon, M.R., in the Irish Court of Chancery in *Shaw* v. *Wilder*. (2) It is in accordance with the common law. In *Willins* v. *Smith* (3) it was held that a written acknowledgment of a debt for necessaries given by the defendant during infancy could be proved against him as an answer to a plea of the Statute of Limitations. In Taylor on Evidence, 7th ed., vol. i., p. 625, other cases to the same effect are cited. Assuming, however, that the practice of the Court of Chancery was as suggested on behalf of the plaintiff, it has been altered under the Judicature Acts. The object of Order XVI., r. 21, Order XIX., r. 13, and Order XXXIV., r. 4, would seem to be, in accordance with the former practice, to prevent infants from being prejudiced by admissions made by their representatives. On the other hand, neither Order XXXI. nor Order XXXII. contains any rule specifically exempting an infant plaintiff or defendant from liability himself to make discovery or specifically preventing either from being bound by an admission made by himself in an action.

Aspland, in reply.

(1) 22 Q. B. D. 577. (2) 2 Molloy, 532.
(3) 4 E. & B. 180.

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CAVE, J. I am of opinion that this appeal should be allowed. It is impossible to read the cases to which reference has been made by the learned counsel for the plaintiff without seeing that it was not the practice of the Court of Chancery under any circumstances to allow interrogatories to be administered to infants, whether plaintiffs or defendants. The fact that interrogatories could be administered to the next friend or guardian of an infant is sufficient of itself to shew this; because recourse would never have been had to so unsatisfactory a process, if it had been possible to interrogate the infant himself. The decisions and observations which have been cited all, as it appears to me, point to this conclusion. In order, therefore, to justify this order it must be shewn that the practice of the Court of Chancery in this respect has been abrogated by the Judicature Acts. So important a change could scarcely be made except by an express provision; and there is no provision for it either in the Acts or in the rules. Arguments from reason do not affect the question. As the practice has not been altered by the Judicature Acts, it still subsists; and the order appealed against is therefore wrong.

A. L. SMITH, J. I am of the same opinion. The learned counsel for the plaintiff has convinced me that, for whatever reason, it was not the practice of the Court of Chancery to allow interrogatories to be administered to infant plaintiffs or defendants. I was struck by the observations which were made upon the anomalous results of the rule, but there is nothing to shew that it has been altered by the Judicature Acts. It is true that the language of Order XXXI., r. 1, "the plaintiff or defendant may . . . deliver interrogatories for the examination of the opposite parties," is perfectly general, but it must obviously be read in connection with that of other rules which relate to parties under disability.

Appeal allowed.

Solicitors for plaintiff: *Bower, Cotton, & Bower, for Ainsworth, Sanderson, & Howson, Blackburn.*

Solicitors for defendant: *Brooks, Jenkins, & Co., for S. Sandeman, Accrington.*

H. D. W.

1890
Feb. 13.

[IN THE COURT OF APPEAL.]

VIBART *v.* COLES.

Executor and Administrator—Plene Administravit—Conflict of Law and Equity—Judicature Act, 1873, *s.* 25, *sub-s.* 11—*Action brought, Payment of another Creditor after—Judgment avoided by Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 27, *Effect of.*

An executor or administrator is entitled, after action brought against him by a creditor of the deceased for his debt, to apply the assets in payment of the debt of another creditor, inasmuch as, the rules of law and equity on the subject having been in conflict, the equity rule must now prevail.

In re Radcliffe (7 Ch. D. 733) followed.

The defendant, an administratrix, after action brought against her for money lent to the intestate by the plaintiff, consented to a judge's order for judgment in a subsequent action by another creditor for a debt due from the intestate, and judgment was signed accordingly. The judgment was void as against creditors, though not as between the parties, because the judge's order was not filed as required by the Debtors Act, 1869, s. 27. The defendant having paid the amount of that debt which exhausted the assets:—

Held, that, as between her and the plaintiff, the original debt was not merged in the judgment, and that she was entitled to make the payment in respect of such debt.

APPEAL from the judgment of Bowen, L.J., at the trial.

The facts were as follows:—

The action was against the defendant as administratrix in respect of money lent by the plaintiff to the intestate. The defence was that the defendant had fully administered the estate, and there were no assets for payment of the plaintiff's debt. (1) It appeared that, after the service of the writ, the defendant consented to a judge's order for judgment in a subsequent action by another creditor for a simple contract debt due from the intestate, and judgment was signed accordingly. The judge's order was not filed as required by the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 27, and therefore the judgment was void as against creditors. The defendant paid the amount of such

(1) It should be observed that the terms of the old defence of plene administravit were not precisely applicable, because it alleges that the defendant had no assets at or since the commencement of the action, which was not the case here, and the statement of defence had to be amended accordingly.

last-mentioned debt, which exhausted the assets available, and the question at the trial was, whether she was entitled to make such payment as against the plaintiff.

Bowen, L.J., held that, the judgment signed in the second action being void as against creditors by reason of the provisions of the 27th section of the Debtors Act, 1869, the original debt in respect of which it was given must be considered as still existing, and the defendant was entitled to make the payment she had made in respect of that debt, and he gave judgment for the defendant accordingly.

Jelf, Q.C., and *H. Tindal Atkinson*, for the plaintiff. The judgment signed under the judge's order was void as against creditors by reason of s. 27 of the Debtors Act, 1869, because the order was not filed. Therefore there was no judgment debt. But the judgment was good as between the parties: *Gowan* v. *Wright* (1); and therefore it merged the original debt, so that there was no debt to be paid. Secondly, assuming that the original debt remained, the rule of law has always been that, after action brought against the administrator by a creditor, and notice of such action to the administrator, the right of the creditor suing is to have his debt paid out of the assets existing at the time of action brought, and the executor or administrator cannot as against him voluntarily apply the assets to payment of another creditor's debt: *Tolputt* v. *Wells.* (2) It has been held, no doubt, that, after the commencement of an administration action, and before judgment, the executor or administrator may pay any creditor in full, and the payment will be allowed: see *In re Radcliffe* (3). In that case it was suggested that the rule of law on the subject conflicted with that of equity, and that by the Judicature Act, 1873, s. 25, sub-s. 11, the latter must prevail. But it is submitted that that enactment relates to matters of procedure, not to rights. The rule of law on this subject conferred a substantive right upon the creditor, and was not a mere matter of procedure. The provisions of the Judicature Act were not intended to take away a substantive right of this

(1) 18 Q. B. D. 201.

(2) 1 M. & S. 395.

(3) 7 Ch. D. 733.

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kind. The case of an administration action, such as *In re Radcliffe* (1), is altogether different from that of a common law action for the debt. There the object of the action is not to recover the debt, but to get hold of the assets for distribution among the creditors. In that action, when judgment is given, the hands of all the creditors are tied, and they can only come in and prove against the estate. The common law rule was not really applicable in such an action. If the administrator can prefer another creditor voluntarily after action brought, he can deprive the creditor suing of all benefit from his action.

[LORD COLERIDGE, C.J.:—Apart from any question of bankruptcy, that is only what the intestate himself might have done, if alive.]

They also cited *In re Smith, Ex parte Brown* (2).

Finlay, Q.C., and *Forman*, were not called upon.

LORD COLERIDGE, C.J. In this case I think that the learned Lord Justice was right and his judgment should be affirmed. The action is against an administratrix for money lent to the intestate. After action brought another creditor sued the administratrix for a debt due from the intestate, and a judge's order was given by consent for judgment in that action. Judgment was entered accordingly, but, the judge's order not being filed, that judgment is void as against creditors by reason of the provisions of s. 27 of the Debtors Act, 1869; but, although void as against creditors, it is good as between the parties to the judgment, and, therefore, no doubt, as between those parties the original debt was merged in the judgment debt. The defendant has paid the amount of the debt and pleads that she has no effects of the intestate out of which to satisfy the plaintiff's claim. To that the plaintiff answers that there was no debt to pay; that a judgment had been given for the debt, that the judgment was gone by reason of the provisions of the Act of Parliament, and that the original debt was gone by reason of the judgment. A person cannot, however, be heard to say at one and the same time that the judgment is void and yet that the debt which existed before judgment is merged. The debt must remain

(1) 7 Ch. D. 733. (2) 20 Q. B. D. 321.

if the higher security is void. Therefore the defendant has a right to say that the original debt was not gone.

But, secondly, it is said on behalf of the plaintiff that at common law an administratrix could not pay such a debt after action brought by another creditor and notice of such action. But the Judicature Act provides that, where the rules of equity and hose of common law conflict, the former shall prevail. It appears to me clear that the rule in equity on this subject was in conflict with that of the common law, and therefore by the terms of the Judicature Act the equity rule must prevail. If authority were needed upon such a point, there is the direct authority of the late Master of the Rolls in the case of *In re Radcliffe*. (1)

LORD ESHER, M.R. In my opinion two short propositions suffice to decide this case. The first is that a creditor, who says that a judgment is void, cannot at the same time say that it has swallowed up the debt in respect of which it was given, and, that being so, he cannot say that there was no debt to pay. The second is that, there being a rule of law which said that an administrator could not after action brought by one creditor pay another creditor as against the creditor suing, and a rule of equity which said that he could, the Judicature Act expressly says that the latter rule is to prevail.

FRY, L.J. I agree. The first point suggested is this: it is said that the effect of the 27th section of the Debtor's Act, 1869, is to make the judgment void as against creditors, but not as between the parties to it; that the judgment, therefore, that was signed, though bad as against the plaintiff, was good as against the defendant, the administratrix; and consequently the defendant cannot say that she paid the debt in respect of which the judgment was signed, because that debt was merged in the judgment debt. This argument is fallacious. If the judgment is void as between the administratrix and a creditor, it follows that as between them it works no merger of the original debt. The plaintiff's contention can only be made by applying the provisions of the statute in one part of such contention and ignoring

(1) 7 Ch. D. 733.

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VIBART v. COLES.

Fry, L.J.

them in the other. With regard to the other point, it is provided by the Judicature Act that, where the rules of equity conflict with those of common law, the former shall prevail. It was argued that this provision was not intended to affect rights, but that argument is answered by asking what rule of law or equity there is which does not affect rights. A rule is not less a rule because it affects rights.

Appeal dismissed.

Solicitors for plaintiff: *Robbins, Billing, & Co., for E. C. Petgrave.*

Solicitor for defendant: *Montagu Hawkins.*

E. L.

1890

Feb. 18, 24.

MACARTNEY *v.* GARBUTT AND OTHERS.

International Law—Ambassador, Privilege of—Secretary of Embassy—British Subject accredited by Foreign Government to Great Britain.

A British subject, accredited to Great Britain by a foreign government as a member of its embassy, is, unless he has been received by the British government upon the express condition that he shall be subject thereto, exempt from the local jurisdiction of his own country, and therefore, where this condition has not been imposed on him at the time of his reception, his household furniture is privileged from seizure for non-payment of parochial rates.

CASE tried before Mathew, J., without a jury.

The facts and arguments sufficiently appear in the judgment.

Sir W. Phillimore, and *McCarthy*, for the plaintiff.

English Harrison, for the defendants.

Cur. adv. vult.

1890. Feb. 24. MATHEW, J. In this case the plaintiff sought to recover 118*l.*, which he had paid under protest to get rid of a distress upon the furniture in his house, levied by the defendants for parochial rates. The defendants contended that the distress was lawful, and that therefore the plaintiff was not entitled to recover.

The plaintiff, Sir Halliday Macartney, who was an English subject, had been appointed by the Chinese government English secretary of the Chinese embassy, and had been received in that capacity by the British government. His name had been submitted to the Foreign Office in the usual way, and his position as a member of the embassy recognized without reservation or condition of any sort. He would therefore seem to be clearly entitled to the privileges of the "corps diplomatique," and it would follow that his personal effects would be exempt from seizure. His rights in this respect appeared to be fully recognized by the local Act, 35 Geo. 3, c. 73, under which the rates were levied. Sect. 190 of that Act provides: "And be it further enacted that every rate or assessment which shall be made, laid, or assessed by virtue of this Act for or in respect of any land, ground, house, shop, warehouse, wharf, coachhouse, stable, cellar, vault, building, tenement, or hereditament whatsoever, which any ambassador, envoy, resident agent, or other public minister of any foreign prince or state, or the servant of any such ambassador, envoy, resident agent, or other public minister, or any other person not liable by law to pay such rate or assessment, now doth or hereafter shall inhabit, shall be paid by and recoverable from the landlord, owner, lessor, or proprietor of every such land, ground, house, shop, warehouse, wharf, coachhouse, stable, cellar, vault, building, tenement, or hereditament respectively, who shall be liable and compellable to the payment thereof, and the same shall be recovered and applied as the other rates hereby made payable are to be recovered and applied."

For the defendant it was conceded that the plaintiff, if he had been a foreigner, might be entitled to the exemption which he claimed; but it was argued that, as a British subject, he remained liable to the laws of his own country; and it was said that he was not within the description of persons exempt by the local Act, for the operation of the Act was limited by the words "or any other person not liable by law to pay such rate."

In support of this contention, reliance was placed on passages of Chapter XI. of Bynkershoek "De Foro Legatorum," which, it was said, shewed that the minister of a foreign state accredited to his own country remained subject to the laws of the state to

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which he owed allegiance. But the view of the learned author would seem to be that the envoy would be entitled to exemption from the local jurisdiction in all that related to his public functions, and this would seem to be the opinion of later writers on the subject (see Wheaton, International Law, 2nd ed., edited by Lawrence, p. 189, and the authorities there referred to). If this be the rule, the plaintiff would be protected from the seizure in question, which unquestionably interfered with the performance of his duty as a member of the embassy.

But there is another principle which appears to afford the plaintiff the protection which he claims. Bynkershoek, in Chapter VIII., and all the later writers on the subject, recognize the right of the state to impose such conditions as are thought proper upon the reception of a member of a foreign embassy. But it is said, if the envoy be received without reservation, the condition is to be tacitly implied that he fully enjoys the "jus legationis." Bynkershoek points out that the only mode of escaping from the doctrine of exemption is to impose on the envoy, when received, a condition that he shall be subject to the local jurisdiction. This principle is, as it would seem, with much good sense, extended by later writers to the case of the envoy accredited to his own government. Thus Wheaton, International Law, p. 395, suggests that the privilege of the envoy to exemption from the civil jurisdiction of his own country is not lost where there has been no express condition to the contrary at the time when the member of the embassy is received by his own government. Again, Calvo, "Droit International," 2nd ed., vol. I., book X., sect. 438, refers to the practice of some governments to impose upon their own subjects, when received as envoys, the obligation to remain subject to the laws of their own country. He adds: "These conditions ought always to be expressly stated before or at the time that the member of the embassy is received." The rule is stated in similar terms in Phillimore's International Law, vol. II., sect. 135. The learned author refers to many authorities in support of this position. In this case it appears from the correspondence which passed between the Home Office and the defendants, that no such condition had been imposed upon the plaintiff. I am therefore of

opinion that his goods were not liable to seizure, and that he is entitled to judgment for the amount claimed and costs.

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MACARTNEY v. GARBUTT.

Judgment for the plaintiff.

Solicitors for plaintiff: *Harwood & Stephenson.*
Solicitors for defendants: *Clarkson, Greenwell, & Co.*

H. D. W.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF RICHARD WESTBROOK *v.* THE VESTRY OF ST. PANCRAS.

1890
Feb. 1.

*Metropolis Management Acts—Officer of Vestry—Superannuation Allowance—Discretion as to Amount—Exercise of Discretion—*29 & 30 *Vict. c.* 31, *ss.* 1, 4.

A metropolitan vestry has a discretion under 29 & 30 Vict. c. 31, s. 1, not merely as to granting or refusing a superannuation allowance to a retiring officer, but also, if an allowance be granted, as to the amount, subject to the scale of maximum allowances prescribed in s. 4.

Reg. v. *St. George's, Southwark* (19 Q. B. D. 533) overruled.

A vestry in declining to grant a superannuation allowance to a retiring officer were influenced by the idea that they had no discretion as to the amount:—

Held, that the vestry had not properly exercised their discretion, and that a mandamus should go to them to consider and determine the application.

RULE calling on the vestry of St. Pancras to shew cause why a writ of mandamus should not issue commanding them to consider and determine the matter of the application of Richard Westbrook for an annual allowance under 29 & 30 Vict. c. 31, on his retirement from the office of collector of rates, and to take all other steps necessary for securing to him the allowance as prescribed by the provisions of the Act.

It appeared from the affidavit of the prosecutor that he was appointed collector of rates for the parish of St. Pancras in November, 1858. In December, 1888, he wrote to the vestry clerk that in consequence of declining health he was unequal to the discharge of his duties as collector, asking that the letter should be placed before the vestry, and requesting that he might be allowed to retire at Lady Day then next, "upon such

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superannuation allowance as the vestry are empowered to grant for long services." This letter was brought before the vestry and referred to the finance committee with an instruction to them to consider whether in filling up the vacancy a condition might not be inserted in the appointment providing that the future collector should not be entitled to any superannuation allowance. The finance committee considered the matter, and reported recommending the vestry to grant a superannuation allowance of 230*l.* On January 23, 1889, a vestry meeting was held, at which the report of the finance committee was brought up, and it was proposed, pursuant to notice: "That the report of the finance committee be received, and that one month's notice be given to every member of the vestry that a proposal to make a superannuation allowance of 230*l.* per annum to Mr. Westbrook on his retirement after thirty years' service will be brought forward at a vestry to be held at a date to be fixed." A discussion ensued, in the course of which it was pointed out that the amount of the allowance was fixed by the Act of Parliament, and it was stated that the committee had been informed that if the vestry granted the allowance it must be in accordance with the scale laid down in the Act; and that if it had not been for this the committee would not have recommended so large an amount, and thereupon an amendment was carried: "That the report be referred back to the committee for further consideration, with instructions to confer with Mr. Westbrook with a view to a reduction of the amount." The matter came again before the finance committee, who reported that they had conferred with Mr. Westbrook with a view to a reduction of the amount of superannuation allowance recommended in their previous report, and that they had been unable to prevail upon Mr. Westbrook to accept of a sum less than that fixed by the scale in the 4th section of the Act. On February 6, 1889, a meeting of the vestry was held, at which the second report of the committee was brought up, and it was resolved: "That, in accordance with the notice given and entered on the minutes, the report of the finance committee recommending a superannuation allowance to Mr. Westbrook be received, and that one month's notice be given to every member of the vestry that a proposal to make a grant of a super-

annuation allowance of 230*l.* to Mr. Westbrook on his retirement after thirty years' service will be brought forward at a vestry to be held on Wednesday, March 20, 1889, at four o'clock in the afternoon." At a vestry meeting held in pursuance of this resolution, a motion to grant Mr. Westbrook a superannuation allowance of 230*l.* was put and lost. At a subsequent meeting of the vestry it was resolved to give notice to Mr. Westbrook to cancel and determine his appointment from the date of the notice, and to intimate to him at the same time that the vestry, at a meeting duly held on March 20, decided that no superannuation allowance should be granted to him.

The statute 29 & 30 Vict. c. 31, recites that it is expedient that provision should be made to enable superannuation allowances to be granted to officers of vestries of any parish and district boards of any district and of other parochial bodies within the metropolis who become disabled by infirmity or age to discharge the duties of their offices, and enacts:—

Sect. 1. "The vestry of any parish . . . may, at their discretion, grant to any officer in their respective services . . . who shall become incapable of discharging the duties of his office with efficiency by reason of permanent infirmity of mind or body, or of old age, upon his resigning or otherwise ceasing to hold his office, an annual allowance, not exceeding in any case two-thirds of his then salary, regard being had to the scale of allowances hereinafter contained. . . ."

Sect. 4. "Subject to the provisions herein contained, the allowance to be granted after the commencement of this Act to persons who shall have served in an established capacity as officers as aforesaid, whether their remuneration be computed by weekly wages, poundage or percentage on collection of rates, or annual salary, shall be as follows; (that is to say),

"To any person who shall have served ten years and upwards, and under eleven years, an annual allowance of ten-sixtieths of the salary and emoluments of his office;

"And in like manner an addition of one-sixtieth in respect of each additional year of such service until the completion of a period of service of forty years, when the annual allowance of forty-sixtieths may be granted. . . ."

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1889. Nov. 22. *C. A. Russell*, shewed cause, and contended that though the pension if granted must be in accordance with the scale: *Reg.* v. *Vestry of St. George's, Southwark* (1), the vestry had an absolute discretion to grant or refuse it, and had exercised that discretion.

Morton Smith (*Henn Collins, Q.C.*, with him), in support of the rule, contended that the vestry had a discretion as to granting a pension, but that in the exercise of that discretion they had no right to consider the question of amount over which they had no control.

THE COURT (Lord Coleridge, C.J., and Mathew, J.) held that the vestry had really decided that the prosecutor was entitled to a pension, but had refused to grant it as the amount which, according to the decision in *Reg.* v. *Vestry of St. George's, Southwark* (1), was fixed by the Act, was such as they did not approve; that in thus acting they had not exercised a proper legal discretion, and that the mandamus should go.

The vestry appealed.

1890. Feb. 1. *Poland, Q.C.*, and *C. A. Russell*, in support of the appeal. By s. 7 of the Act no grant is to be made without one month's previous notice to every member of the vestry, consequently the meeting of March 20 was the only one that could deal with the question. At that meeting the application was considered and refused, and that being so no mandamus will lie.

The Divisional Court was bound by *Reg.* v. *Vestry of St. George's, Southwark* (1), but it is submitted that case was wrongly decided. The right view of the statute is that the 1st section gives full discretion, not only as to whether a pension shall be granted, but also as to the amount, subject to the scale of maximum allowance stated in s. 4. The mandamus in effect commands the vestry to grant the full pension of 230*l.*, and leaves them no discretion as to amount.

Henn Collins, Q.C., and *Morton Smith*, contrà. The question is whether the vestry arrived at their determination by the exercise of a legal discretion or from some indirect motive. The Act is

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for a public purpose, and acts of the vestry done under it are public acts so as to give authority to the Court to ascertain if there has been a bonâ fide exercise of discretion. If the decision in *Reg.* v. *Vestry of St. George's, Southwark* (1) is supported, the vestry were wrong in considering the amount in determining whether the prosecutor was entitled to any pension, for they should determine the fitness of the applicant for a pension, and then the scale would come into force. If, however, the case cannot be supported, the vestry have been misled as to their powers. In either case the mandamus should go. It is understood that if the amount is in their discretion, the vestry will consider the application favourably.

LORD ESHER, M.R. In this case, as so often happens, things have been considered in this Court which were not before the Court below. That Court could not go, as has been done here, into the question whether the case of *Reg.* v. *Vestry of St. George's, Southwark* (1) was rightly decided. That has been gone into before us, and I have considered the words of the statute, and am prepared to agree with what I take to be the view of the Lord Chief Justice and Mathew, J., and to exercise the power which they were not in a position to exercise—that is, to disagree with the decision in that case. Some questions have been argued to-day as to the circumstances under which mandamus will lie, which it is not necessary to determine. I have no doubt about what is the right thing for a vestry to do on the resignation of his office by a servant of theirs, and his application under this statute. I have no doubt that the vestry should take his application into their fair consideration, and do what they think fair to the man under the circumstances, and if they do this, I have equally no doubt that the legislature has entrusted the sole discretion to them, and that no mandamus could go to them to alter their decision. But they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider

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not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

Now let me examine the Act of Parliament. It is "an Act to provide superannuation allowances," and recites that it is expedient that provision should be made for that purpose. Now I agree that this means that it is expedient, in the interest of a sufficiently large body of the public, to make it a matter of public expediency, that provision should be made to enable superannuation allowances to be made to officers who have become incapacitated by infirmity or age from discharging the duties of their offices. Where that is the case, the vestry of any parish and certain other bodies may in their discretion grant to any officer who satisfies the conditions an annual allowance. If the matter had stopped there, and in a subsequent part of the statute there had been found a fixed amount which was to be given, I should have thought that the discretion was limited to the question whether there should be an allowance or not. But the section goes on, "an annual allowance not exceeding two-thirds of his then salary." This by necessary implication involves that they may give less than the two-thirds. Then looking at s. 6 we can see that to be the meaning of the legislature, because the expression there is, "a gratuity not exceeding three months' pay for every two years' service," as to which no one could doubt that a less gratuity than the three months' pay might be given. Then there are the words in s. 1, "regard being had to the scale of allowance hereinafter contained." That scale is set out in s. 4, and is a rising scale according to the number of years' service. They are, therefore, to look at that scale to see the number of years' service, but that does not affect the power given by s. 1 or the necessary implication from the words, "not exceeding," used in that section. It seems to me, therefore, that they have a discretion as to the amount though they cannot go beyond that set out in the scale. This interpretation takes away all difficulty in considering the meaning of s. 4, for the word "shall" only applies to the use of the scale to ascertain the maximum, and not otherwise to the question of amount; and further it gives a reasonable, fair and sufficiently elastic power to the vestry, instead of a hard and fast rule which may work injustice in some cases.

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Some supposed difficulty was raised that if any amount is proposed, the vestry could only say "yes" or "no" to that proposal. That is raising a difficulty which does not exist, for, if a proposition is made, any one can propose an amendment, that is every-day business, and there can be no difficulty. The duty of the vestry will, therefore, be to consider what is due to a particular servant under the circumstances of his case, and to vote that sum, and if they do that, there is full discretion and there is no right to interfere with what they do.

The result in this case seems to me to be that even if the interpretation put on the Act in *Reg.* v. *Vestry of St. George's, Southwark* (1) had been the right one, which I think it was not, the vestry did not bring their minds to the question which they had to decide, and took into account circumstances which they ought not to have taken into account, and so did not properly exercise their discretion. Even on this view of the Act of Parliament I should not be prepared to dissent from the judgment of the Divisional Court. But I think we may modify the mandamus so as to enable the vestry to do what in my view of the statute they have a right to do, and what as I understand from their counsel they are prepared to do, that is to consider what sum it is just to vote, and we shall accordingly modify the rule for that purpose.

FRY, L.J. On December 24, 1888, Mr. Westbrook addressed a letter to the vestry clerk in which he stated that he requested to "be allowed to retire at Lady Day next upon such superannuation allowance as the vestry are empowered to grant for long services." That tender of retirement must be taken to have been accepted by the vestry and acted on by them. Then, after certain intermediate proceedings to which I shall not refer, on February 6 the vestry passed a resolution adopting the report of the Finance Committee, recommending a superannuation allowance to Mr. Westbrook, and resolving that "one month's notice be given to every member of the vestry that a proposal to make a grant of a superannuation allowance of £230 to Mr. Westbrook on his retirement after thirty years' service will be brought

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forward at a vestry to be held on Wednesday, March 20, 1889, at four o'clock in the afternoon." Thereupon a certain notice is given to which I shall presently refer for a meeting on March 20, and at that meeting a proposal was made that a superannuation allowance of £230 should be given to Mr. Westbrook, and that resolution was rejected by the meeting. The question is whether under those circumstances a mandamus can go to the vestry. In my opinion it ought to go. I will not say that if the vestry had fully and properly considered Mr. Westbrook's letter and decided upon it this application could have been successful. In the present case the vestry had accepted a tender of resignation conditional upon a vote of an annuity being given, and although that would not itself amount to a vote of the annuity, yet it seems to me to bind them to propose the matter to a proper vestry. Even that it is not necessary to consider, because the vestry resolved that the proposal should be brought forward. There was a duty in the vestry to consider that proposal properly and fairly; Mr. Westbrook had an actual and personal interest in the performance by the vestry of that public duty, and therefore if it has not been performed a mandamus should go. Now in my judgment the vestry have not properly exercised their discretion pursuant to that resolution to submit the proposal, and for two reasons. [The first reason related to the character of the notice summoning the meeting.] The second reason is that the meeting when it came together acted naturally under the bias of the decision in the case of *Reg.* v. *Vestry of St. George's, Southwark* (1), and if that case is right of course its influence on their minds was legitimate. If the case is wrong then they have without any fault on their own part exercised a discretion under a mistaken view of the law; and, therefore, we are driven to consider whether the decision in *Reg.* v. *Vestry of St. George's, Southwark* (1), was right or wrong. Now, with great deference to the learned judges who decided that case, I think it was wrong. The question turns upon the true meaning of the statute of 1866. The suggestion made is this: that that statute enables and requires the vestry to consider a single question, whether a retiring officer shall have an allowance or not. If they deter-

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mine that affirmatively, then it is said the quantum of pension is determined by the statute. The result would be that they must shut their eyes as to the amount to be voted, and simply consider the merits of the claim—if they hold that the retiring officer is entitled to a pension then the statute enacts that he is to have a pension of a particular amount. Of course the legislature might have been minded so to legislate, but if they had I think they would have given power to the vestry to consider the question yea or nay—is the retiring officer entitled to a pension, and then have enacted that if the answer was affirmative the pension should be so much. I think the Act of 1866 does not do that; but it gives a much more usual, and I am bound to say more reasonable, power to determine, not merely whether there shall be a pension, but, what the amount of the pension shall be within certain limits. The 1st section clearly declares that the grant is to be at the discretion of the vestry; but when you come to look at the terms of the grant, it is the grant of an annual allowance not exceeding in any case two-thirds of the full salary. Now, pausing there, it is obvious to my mind that the question of amount is not separated and cut off from the discretion as to the grant, but that the discretion is infused into both the questions whether there shall be a grant, and what shall be the quantum of the grant. The statute goes on, "not exceeding in any case two-thirds of his then salary." It is said that this is anticipatory of the 4th section, and I think it is so in one sense, but at the same time it shews that the statute is dealing with the maximum amount. Then come the words which are not easy to construe, "regard being had to the scale of allowances hereinafter contained." That seems to me to indicate that the vestry must look at the scale of allowances. But what is the use of looking at them if they can say nothing about them or do nothing with regard to them? They must look at them for some real purpose. Now there can be no purpose for which they are to look at them if the scale acts automatically; and, therefore, I think although the words are not so felicitous, or so clear as they might have been, that the true meaning is that the vestry or other body shall look at the 4th section to see that they do not exceed it. Then come the words of the 4th section,

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which no doubt appear to be peremptory, that "the allowance to be granted shall be as follows." But I think that the words "shall be" are merely declaratory—declaratory that is of the schedule or scale, which is a scale, as I have already indicated, of maximum allowances. I cannot help saying that that seems to me to be a much more reasonable construction of the Act than the one arrived at by the learned judges in *Reg.* v. *Vestry of St. George's, Southwark* (1), or put before us now on behalf of the vestry. I hold, therefore, that the vestry had a discretion, although when they considered the point they were told that according to the decision of the Queen's Bench Division they had not a discretion. Consequently they cannot be said to have exercised that discretion in a proper manner. I believe that the Master of the Rolls agrees with me that the mandamus should be altered by leaving out the words, "and to take all other necessary steps for securing to the said Richard Westbrook the allowance as prescribed by the provisions of the said Act," so as merely to require the vestry to consider and determine the application. I am glad that the vestry have taken the view they have, that if we can set them free from the fetters of the statute as interpreted by the decision in the previous case they will be glad to reconsider the question, and I think that the proper way would be not to disturb the order of the Court below with regard to costs, but to give no costs of either party in this Court.

Rule absolute.

Solicitors for prosecutor: *Beale, Phillips, & Beale.*
Solicitors for defendants: *Cunliffes & Davenport.*

A. M.

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[IN THE COURT OF APPEAL.]

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Feb. 13.

BARLOW AND OTHERS *v.* ROSS.

Artizans and Labourers Dwellings Improvement Act, 1875 (38 & 39 *Vict. c.* 36), *s.* 20—*Right or Easement in or relating to Land purchased under the Act, Extinction of—Enjoyment of Light for Twenty Years ending after such Purchase—Inchoate Rights or Easements extinguished—Compensation.*

The 20th section of the Artizans and Labourers Dwellings Improvement Act, 1875, provides that, upon the purchase by the local authority of any lands required for the purpose of carrying into effect an improvement scheme under the Act, "all rights of way, rights of laying down or of continuing any pipes, sewers, or drains on, through, or under such lands, and all rights or easements in or relating to such lands shall be extinguished," subject to the provision that compensation shall be paid by the local authority to any persons or bodies of persons proved to have sustained loss by the section :—

Held, that the above-mentioned section applies to the easement of light, and that it includes cases where a right or easement is in process of being acquired by enjoyment under the Prescription Act at the date of the purchase of the land, and has the effect of extinguishing such inchoate rights as well as rights or easements already acquired over such land : and therefore that the owner of a house, to which there had been access of light over land purchased by a local authority under the Act for a period of ten years before and ten years after such purchase, did not gain an easement of light under the Prescription Act by reason of such twenty years' enjoyment.

Semble, such an owner would be entitled to compensation to the extent to which the value of his house might be diminished by the operation of the section.

APPEAL from the judgment of Hawkins, J., at the trial.

The action was for obstruction of the access of light to the windows of a house belonging to the plaintiffs, and the facts as proved at the trial before the learned judge with a jury were so far as material as follows :—

The house in question, which was situated in Birmingham, was built in the year 1867. In the year 1877 the corporation of Birmingham purchased a quantity of land under the provisions of the Artizans and Labourers Dwellings Improvement Act, 1875, for the purposes of an improvement scheme under that Act.

In 1886 the corporation, in pursuance of the provisions of the Act, let to the defendant for a term of years a portion of

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such land opposite to the house of the plaintiffs upon certain conditions as to building thereon in conformity with the scheme. In 1888 the defendant pulled down certain low buildings which had previously existed upon the land so let, and in pursuance of the conditions in his lease erected higher buildings so as to obstruct the access of light to the windows of the plaintiffs' house, which had existed since the building of the house in 1867.

In December, 1888, the plaintiffs brought the action.

It was contended for the defendant that the plaintiffs were prevented from acquiring an easement of light through the twenty years' enjoyment by the provisions of the 20th section of the Artizans and Labourers Dwellings Improvement Act, 1875. (1)

The jury found that the plaintiffs' lights were obstructed, and assessed the damages at 100*l.*

The learned judge was of opinion that inchoate or accruing rights were within the 20th section of the Artizans and Labourers Dwellings Improvement Act, 1875, as well as actually existing rights, and he therefore gave judgment for the defendant.

William Graham, for the plaintiffs. The plaintiffs were entitled to the easement of light under 2 & 3 Wm. 4, c. 71, by reason of twenty years' enjoyment prior to 1888. The 20th section of the Artizans and Labourers Dwellings Improvement Act, 1875, does not apply, because the plaintiffs had no right or easement of light in 1877, when the corporation purchased the land for the purposes of the Act. There is no right or easement under the Prescription Act until the statutory period of enjoyment is complete. There cannot properly be said to be even an inchoate

(1) That section provides that "upon the purchase by the local authority of any lands required for the purpose of carrying into effect any scheme authorized by a confirming Act, all rights of way, rights of laying down or continuing any pipes, sewers, or drains, on, through, or under such lands, or any part thereof, and all other rights or easements in or relating to such lands or any part thereof shall be extinguished . . . . subject to this provision, that compensation shall be paid by the local authority to any persons or bodies of persons proved to have sustained loss by this section, and such compensation shall be determined in the manner in which compensation for lands is determinable under this Act or as near thereto as circumstances admit."

right. Therefore there was no right or easement that could be extinguished under the section. The corporation might have prevented the future acquisition of any such right or easement by building or erecting a hoarding in front of the plaintiffs' windows before the twenty years' enjoyment was complete. The section obviously contemplates that compensation shall be given in all cases where a right is extinguished by reason of its provisions. The plaintiffs could not possibly obtain compensation against the corporation, because the answer to their claim would be that they had no right or easement, and the corporation might legally obstruct their lights. It would, therefore, be a great hardship that they should be prevented from acquiring an easement on the completion of twenty years' enjoyment after the purchase of the land.

[He cited on this point *Ladyman* v. *Grave* (1), *Scott* v. *Pape*. (2)]

It is submitted that the 20th section of the Artizans and Labourers Dwellings Improvement Act, 1875, only applies to positive easements, ejusdem generis with those specifically mentioned, and therefore could not apply to the easement of light.

Henn Collins, *Q.C.*, and *Methold*, for the defendant. The 20th section obviously must apply to all sorts of easements. The effect of the provisions of the Artizans and Labourers Dwellings Improvement Act, 1875, is to authorize and even compel the execution of the improvement scheme and the erection of buildings in accordance therewith, and therefore, whether the plaintiffs are entitled to compensation or not, they cannot maintain an action for any damage occasioned by the erection of such buildings. The 3rd section of the Act provides that the local authority may by resolution declare an area unhealthy, and in that case they are bound to frame an improvement scheme for the rearrangement and reconstruction of the streets and buildings in such area. By s. 6, provision is made for a preliminary inquiry and the hearing of objections taken by persons affected by the scheme, and for the making of a provisional order authorizing the scheme, which must be submitted to Parliament for confirmation. If it be so confirmed, it becomes the duty of the local

(1) Law Rep. 6 Ch. 763. (2) 31 Ch. D. 554, at p. 571.

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authority to carry out the scheme in the manner prescribed by the Act. Sect. 9 provides that they shall purchase the lands required for the scheme, and may let or sell all or any part of the area to which the scheme relates to any purchasers or lessees, for the purposes and under the condition that such purchasers or lessees will, as respects the land so purchased by or leased to them, carry the scheme into execution, and they may insert conditions in any grant or lease binding the grantee or lessee to build as prescribed in such grant or lease. It must have been intended that the land purchased should be freed from all rights whether complete and actually existing or inchoate and in process of being acquired. If it were not so, the scheme of the Act might in many cases be wholly or in a great measure defeated by easements accruing by reason of the statutory period of enjoyment becoming complete shortly after the purchase of the land, and before the authority could carry the scheme into effect. A scheme in a large town involving the reconstruction of buildings over a considerable area of land cannot practically be completely carried into effect all at once, or until the expiration of a considerable time. If the plaintiffs' contention is correct, an injunction might be obtained to prevent the erection of buildings in accordance with the scheme and which the local authority were bound by the Act to have erected. The intention of the legislature in the 20th section was not only to extinguish existing rights, but to impose a fetter preventing the completion of inchoate rights which might be incompatible with the purposes of the Act, and to provide compensation for loss incurred thereby.

[They cited *Duke of Bedford* v. *Dawson* (1), and *Clark* v. *School Board for London.* (2)]

Graham, in reply.

LORD COLERIDGE, C.J. This is in some respects an important case, because the question raised in this action may arise in other cases under the Artizans and Labourers Dwellings Improvement Act. The Act is for the improvement of large towns in respect of the dwellings of the working classes, and contem-

(1) Law Rep. 20 Eq. 353. (2) Law Rep. 9 Ch. 120.

plates the extinction of unsanitary conditions in areas in such towns which are unhealthy. For this purpose it clothes the local authority in such towns with very large powers, carefully respecting, however, the individual rights with which the exercise of such powers may interfere.

The local authority are to frame a scheme with respect to unhealthy areas. The scheme so framed is to be submitted to a Government department, in this case the Local Government Board. Provision is made for giving notice of the scheme to those whom it may concern, and for the hearing of objections to such scheme. The confirming authority, if they approve the scheme, are to make a provisional order, authorizing it to be carried into effect, and ultimately such provisional order must be laid before Parliament. Nothing can be done by the local authority until all these preliminaries have been gone through, until all objections have been considered by the confirming authority, and until the provisional order has been scheduled in a bill, and such bill has been passed by Parliament. There is, therefore, the most careful provision for giving opportunity to any persons prejudicially affected for opposing the scheme, and getting it modified or rejected; but, when it is confirmed, it becomes the law so far as the area to which it applies is concerned, the object of such law being the improvement of the locality.

That being so, the duty is cast upon the local authority of carrying the scheme into effect, and large powers are given to them for that purpose. They are given large powers of purchasing land and expending money. They have power to execute certain specified works themselves, but it is provided that they shall not, without the express approval of the confirming authority, themselves undertake the rebuilding of the houses or the execution of the scheme in other respects.

In this case a large area of land was purchased by the corporation for the purposes of a scheme, and a building was put up by the defendant under the provisions of a lease by the local authority of a portion of such land, which, in accordance with the 9th section of the Act, imposed upon the lessee certain duties and conditions with regard to building. Under that sec-

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tion the local authority may clearly, for the purpose of making lessees and purchasers carry the scheme into execution, impose conditions as to the character of the houses to be erected on the different plots within the area of the scheme. Having that power for the purposes of a scheme intended by the Act to be for the benefit of the town, it becomes their duty to exercise it, and to see that such conditions are fulfilled; and, so far as private interests may be thereby interfered with, there is provision made by the Act for compensation. Sect. 20 provides that, from the date of the purchase of the land by the corporation, "all rights of way," &c., and "all other rights or easements in or relating to such lands, shall be extinguished." I think it clear that the right to light is within the section. It is contended that the true construction of the words is such that, if there has been an enjoyment of an easement over the land for seventeen or eighteen years before the purchase, and the corporation, from the exigencies of business, cannot provide for the execution of the scheme at that particular spot till the expiration of two or three years from the purchase, so that the period of twenty years' enjoyment of the easement began before and is completed after the purchase, then a right to such easement is gained, with the result that there is an end of the powers under the Act and the execution of the scheme, so far as the particular spot is concerned. It is said that the words "rights or easements" only refer to rights or easements existing at the time of the purchase, and, if at that time no actual right existed, because a greater or less part of the period necessary to give the right had not elapsed, then the section does not apply, although the consequence may be that the scheme cannot be carried out, and the corporation is powerless to do that which it is the very object of the Act that they should do. That is a startling contention. I admit that the words primâ facie mean rights or easements actually existing; and it is true that under the Prescription Act a right or easement is gained only after the lapse of the particular time specified, and cannot be considered as existing before that period. All that must be conceded; and, if we were dealing with an Act the subject-matter of which was different from that of the Act now in question, and we could see that to give the words their

primâ facie effect would not defeat the scheme of legislation, we should interpret the words according to their ordinary meaning. But it is plain, if this contention were correct, the result would be that in many cases the objects of the Act would be defeated, and the scheme, which had been the subject of all the elaborate precautions and procedure provided by the Act, might in a few months after its confirmation become inoperative by reason of rights over the land purchased which did not exist at the time of the purchase, but arose shortly afterwards by the completion of the statutory period of prescription. If the plaintiffs' contention be correct, the result would be that two or three persons, or even a single person who chose to insist on his right, might to a great extent defeat the scheme, and there would be no remedy except a fresh Act of Parliament. The difficulty in the way of such a construction is so great that one would shrink from it, unless the language used renders it absolutely necessary. I do not think that it does. Although the words do primâ facie mean what the plaintiffs' counsel contended for, I think that, having regard to the scope of the Act, they may be construed to include inchoate or nascent rights in respect of the land, the value of which is capable of being measured in money. Great powers are given by the Act, the exercise of which would be tyrannous if there were no compensation. Where a section says that rights shall be extinguished, subject to the provision that compensation shall be paid to any person proved to have sustained loss by the section, the argument is very strong, that, if on the one hand the word "rights" ought to receive the wide interpretation which I have mentioned, then on the other hand, on the same considerations, loss sustained by the section may mean anything capable of being measured in money which affects the position of the owner for the worse as regards his rights at any future time in respect of what may be done under the Act. It seems to me that there was in this case a legitimate ground for applying to the corporation for compensation. The plaintiffs had had ten years' enjoyment, which, it is true, in the absence of further enjoyment, would confer no right, but, if there were ten years' further enjoyment, then the Act would prevent the right from arising under the Prescription Act, as it otherwise would. It

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seems to me that, under those circumstances, there may be a loss capable of being measured in money. If the result is to make a man's house appreciably less valuable because an easement of light cannot be obtained by ten years' further enjoyment, as it otherwise would, then that, I think, would be matter for compensation. For these reasons I think that the judgment below was correct, and must be affirmed.

LORD ESHER, M.R. In this case the plaintiffs sue for obstruction of ancient lights, to which they claim title on the ground of twenty years' enjoyment. If the case rested there, and there were nothing to prevent the application of the Prescription Act, the plaintiffs' title would be established; but it is said in answer that the application of that Act and the rights which ordinarily result from such application are intercepted and done away with by the enactments contained in the Artizans and Labourers Dwellings Improvement Act, 1875. The defendant says that by virtue of that statute he was authorized to do what he has done in this case, and that consequently the plaintiffs are not entitled to maintain this action, but were entitled to compensation under s. 20. The plaintiffs' counsel, in order to meet this argument, did what is often done in such cases: he denied that the plaintiffs would be entitled to the benefit of compensation, in order to argue that, because there would be no compensation, therefore it must follow that the Act did not authorize what the defendant did, and the plaintiffs must be entitled to maintain the action. The defendant in answer to that argument contends that the plaintiffs were entitled to compensation, but that, whether that is so or not, the Act did authorize him to do what he did, and consequently the plaintiffs are not entitled to maintain the action. Therefore what the Court has to determine is whether the rights which the plaintiffs would otherwise have possessed have been intercepted and done away with by the Artizans and Labourers Dwellings Improvement Act, 1875. It seems to me clear that the right to light is within the 20th section. I agree with the plaintiffs' counsel that, if the 20th section is read according to the ordinary meaning of the words in the English language as applied to the subject-matter, the word

"rights" would mean rights actually existing, and, therefore, as the right to light does not come into existence till after twenty years' enjoyment, there could be no such right within the ordinary meaning of the word in this case at the time of the purchase of the land. But it is a familiar rule of construction that, although the Court are primâ facie bound to read the words of an Act according to their ordinary meaning in the language, if there are other circumstances which shew that the words must have been used by the legislature in a sense larger than their ordinary meaning, the Court is bound to read them in that sense. We must therefore look at the rest of the Act to see whether there is any reason for reading the words of the 20th section in a sense larger than their ordinary meaning. I am not sure whether I could go the length of the defendant's contention to the effect that, even although no compensation for loss were given by the latter part of the section in such a case, nevertheless, the defendant would be authorized to do what he has done in this case. I do not think it is necessary for us to go that length. I desire to consider the whole Act in order to see whether the true construction is not that the plaintiffs are disentitled to maintain their action, and given a title to compensation for any loss they may have sustained. First of all, I think it is material to consider the general objects of the statute. The preamble states that various portions of many cities and boroughs are so built, and the buildings thereon are so densely inhabited as to be highly injurious to the moral and physical welfare of the inhabitants; that there are in such portions of cities and boroughs as aforesaid, a great number of houses, courts, and alleys, which by reason of the want of light, air, ventilation, or of proper conveniences, or from other causes, are unfit for human habitation, and fevers and diseases are constantly generated there causing death and loss of health, not only in the courts and alleys, but also in other parts of such cities and boroughs; that it often happens that, owing to the above circumstances and to the fact that such houses, courts, and alleys are the property of several owners, it is not in the power of any one owner to make such alterations as are necessary for the public health; and that it is necessary for the public health that many of such houses, courts, and alleys, should be pulled

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down, and such portions of the said cities and boroughs should be reconstructed. Thus the object of the Act is that, where there are the inconveniences and dangers pointed out in the preamble, houses should be pulled down and reconstructed. Reconstruction is therefore one of the objects of the Act. Then how are these objects to be carried out? First of all the local authority are to consider whether the area to which the Act is proposed to be applied is such as to require the remedies provided by the Act; that is to be determined by a resolution to the effect that the area is an unhealthy area. After passing such resolution they are forthwith to proceed to make a scheme for the improvement of such area. Certain proceedings have then to be taken with regard to such scheme, and ultimately it has to be confirmed by Act of Parliament. It has been suggested that the scheme need shew nothing but the amount and position of the land to be taken; but I hardly think that can be so. The scheme is to be accompanied by maps, particulars, and estimates, and I can hardly think that Parliament is to be called upon to adopt a scheme which only shews what land is to be taken. I should think Parliament would require to know what is to be done with the land so taken so as to be able to see whether the new state of things would be better than the old. When the confirming Act is passed, it is the duty of the authority to take steps for purchasing the land and otherwise carrying out the scheme. They are to sell or let all or any part of the area to which such scheme relates to any purchasers or lessees for the purposes and under the condition that such purchasers or lessees will, as respects the land so purchased by or leased to them, carry the scheme into execution. Such leases will provide for building, because reconstruction is part of the object of the Act. The lease must provide for the carrying out of the scheme, and the lessee must build as the lease prescribes. Where the scheme provides for working men's dwellings, but the local authority have failed within five years to sell or let the land for the purposes prescribed by the scheme, or to make arrangements for the erection of the said dwellings, by s. 10, the confirming authority may step in and sell such land subject to the conditions of the scheme and any modifications thereof made in

pursuance of the Act. Therefore the authority so far are not only authorized but compelled to carry out the scheme. It is obvious that, where, in a neighbourhood containing a number of low buildings, such buildings are to be pulled down for the purpose of erecting proper working men's dwellings, such dwellings will be at an increased elevation. No one ever saw blocks of improved workmen's dwellings in towns that were not of very considerable height. It seems to me that the effect of these provisions is to afford strong ground for the defendant's contention that, even if the plaintiffs were not entitled to compensation for any loss sustained, the defendant was authorized by the Act to build in conformity with the scheme, and, if in so doing he must interfere with the lights of the plaintiffs, it would not be a wrongful act. But I should not be inclined to decide that, unless it were absolutely necessary. I should look very narrowly at the provisions of the Act before coming to that conclusion. One would expect compensation to be given in such a case, if loss were sustained. I cannot, however, see how the provisions of the Act can be carried out so as to effectuate the purpose of the legislature, if the right claimed by the plaintiffs in this case can be maintained.

If the contention of the plaintiffs' counsel be correct, and the right, which was inchoate when the land was purchased, cannot be interfered with, if the period required by the Prescription Act has afterwards been completed, then the result would be that persons in the position of the plaintiffs would often be able to prevent the authority from doing the very thing for which they purchased the land, and which they are bound by the Act to do. For in case, after the purchase of the land, the statutory period unavoidably elapsed before the authority were able to deal with the land, then the persons setting up the right could obtain an injunction and prevent the doing of that which the scheme prescribed. The same difficulty would occur in the case of rights of way and other rights, as in that of light. In my opinion, the meaning of the Act is that the land purchased shall be purchased as a clean piece of land, subject to no conditions or obligations other than those which exist in the ordinary case of an owner in fee of land over which there are no rights either

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existing or accruing. That seems also to have been the view of Hawkins, J. If that be the correct view, one would expect that compensation would be given for any loss that might be occasioned. Therefore, though I agree that primâ facie the words of the 20th section only apply to complete rights, it seems to me that, in order that the objects of the Act may be carried out fully with regard to the land purchased, we must construe the word "rights" in that section as including not only actually existing and completed rights, but also inchoate rights. For instance, if a person has property so circumstanced at the time of the purchase of the adjoining property that, if things remain as they are, he will obtain a right on the completion of the statutory period, then I think that he would have an inchoate right which would be extinguished by the 20th section, and it seems to me that he would be entitled to compensation in respect of any loss occasioned by its extinction. But on the other hand, if a person has property which is not so circumstanced that, if things remain as they are, he will obtain a right, e.g., if his land were unbuilt upon so that no access of light was being enjoyed, then there would not be even an inchoate right, and I should say there could be no right to compensation. The question was raised during the argument whether, if, after the purchase of the land by the authority, an owner of adjoining land built a house with windows looking over the land so purchased, or began to use a way over such land, and he continued to enjoy access of light to his windows, or the use of the way over the land purchased for twenty years, he would obtain a right, notwithstanding the 20th section. I do not think it is necessary to determine that question. I am inclined to think that he would obtain a right, but it is not necessary to decide that point. I am of opinion that the judgment of Hawkins, J., was right, and ought to be affirmed.

FRY, L.J. I am of the same opinion. In the year 1867, the plaintiffs' house was built. In 1877 the corporation purchased land on the opposite side of the street under the Artizans and Labourers Dwellings Improvement Act, 1875. In 1886 they let part of the land so purchased to the defendant by

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a lease which required him to erect a building of a particular kind, which he accordingly did erect, and which has interfered with the plaintiffs' lights. In 1888 the plaintiffs brought this action alleging an enjoyment of the light for more than twenty years previously. The defendant replies that ten years of that period ought not to be counted, because the right to count them has been extinguished by the Act. The inquiry which we have to make is whether that is the case. I will not read the words of the section at length, as they have been so often referred to during the argument. The particular words with which we have to deal are "rights or easements in or relating to such land." It was argued that, having regard to the context, the words must be read as confined to rights or easements of a positive nature. I think that the legislature plainly intended to deal with all rights and easements. The more difficult question in the case is whether the section has extinguished the power of counting the ten years' enjoyment of the access of light previous to the purchase of the land by the corporation. It is no doubt true that that enjoyment gave no right, and therefore there was, strictly speaking, no right to be extinguished; and that, primâ facie, the words of the Act apply to rights which can be extinguished, and therefore would not include this case. But we must not rest merely on the primâ facie meaning of the words; we must also consider how far that meaning is affected by the exigency of other parts of the Act. Under s. 9 the local authority, which is not a trading body or a body existing for the purposes of personal profit, but a public body, is clothed with the power of prescribing the mode in which buildings are to be erected on the land purchased, evidently with a view to the general interests of the place; and therefore they must have power to prescribe the elevation of buildings. As a public body vested with a power to be exercised in the public interest, they have a duty to exercise it where it ought to be exercised. So they would have, in cases where it was proper to do so, not only a power but also a duty to prescribe the elevation. Such power is independent of any right to light already acquired by owners of adjacent land. Is it also clear that the land is to be free from any right to light which is inchoate? I think the question almost answers itself, for other-

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wise the authority would be free from rights which had actually accrued at the time of the purchase of the land, but would be fettered by rights which had not accrued but were merely accruing then, and which accrued afterwards. Such a construction would, as it appears to me, be absurd. It would be inconsistent with the duty to prescribe the elevation of buildings on the land purchased. Therefore I think that we must give an enlarged meaning to the words "rights" and "extinguished" in the section, and that the right to count the ten years' enjoyment before the purchase was taken away, and consequently that the plaintiffs were entitled to compensation for any loss thereby occasioned; for it is obvious upon the terms of the section that the right to compensation is co-extensive with extinguishment of rights. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs: *Field & Roscoe, for Smith, Pinsent, & Co.*

Solicitors for the defendant: *Burton & Co., for Hall Travers Edge.*

E. L.

1889 *Dec.* 19, 20; 1890 *Jan.* 13, 31.

(1) IN RE SUNDERLAND 36TH UNIVERSAL BUILDING SOCIETY. KING AND CORDNER, APPELLANTS; RAWLINGS AND ANOTHER, RESPONDENTS.

(2) IN RE SUNDERLAND 32ND UNIVERSAL BUILDING SOCIETY. RAWLINGS, APPELLANT; OLIVER, RESPONDENT.

(3) IN RE SUNDERLAND 36TH UNIVERSAL BUILDING SOCIETY. RAWLINGS AND ANOTHER, APPELLANTS; WILKINSON, RESPONDENT.

Building Society—Winding-up—Notice of Withdrawal—Insolvency before Winding-up Order—Effect of Notice of Withdrawal given or maturing after Insolvency, but before Winding-up Order—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 32, *sub-s.* 4.

One of the rules of certain building societies provided as follows: "On and after the expiration of the first twelve months, any member may withdraw the subscription money which he may have contributed, with such an amount of interest as may be determined by the committee, such member to give notice of his intention to withdraw in writing to the secretary, and should more than one member give notice to withdraw at one time, the member so giving notice shall be paid in rotation, according to the priority of notice, provided always

that the said society shall not be required or obliged to make such payment as aforesaid, until they have sufficient funds in hand for that purpose, and also to meet the then existing legal liabilities of the society":—

Held, that the rule provided only for withdrawal from the societies while they were or were believed to be solvent, and that, therefore, notices of withdrawal, which were given or which matured at a time when the societies were known to be insolvent, though before the actual date of the winding-up order in each case did not entitle the shareholders who had given them to be paid the amount of their subscriptions in priority to other shareholders in the winding-up:

Held, also, that shareholders whose notices of withdrawal had matured before the societies were known to be insolvent, but who had not received the sums due to them, were not, in the absence of a determination by the committee under the rule of the amount due to them in respect of interest, entitled to be allowed interest on those sums in the winding-up till payment.

Brownlie v. *Russell* (8 App. Cas. 235) and *Walton* v. *Edge* (10 App. Cas. 33) considered.

APPEALS from orders of the Sunderland County Court, made in the winding-up of the Sunderland 36th and the Sunderland 32nd Universal Building Societies. These societies were two of ten terminating building societies, similarly named and numbered, which were being wound up voluntarily under the supervision of the Court, pursuant to sub-s. 4, s. 32 of the Building Societies Act, 1874 (37 & 38 Vict. c. 42).

The 3rd rule of both societies as to the "objects of the society" was as follows: "This society is established for the purpose of raising by the subscription of its members a stock or fund for making advances to members out of the funds of the society, upon security of freehold, copyhold or leasehold estate, by way of mortgage, and so far as is necessary for the said purpose, shall have power to hold land with the right of foreclosure, and may from time to time raise funds by the issue of shares of one or more denominations, either paid up in full, or to be paid by periodical or other subscriptions, and with or without accumulating interest, and may repay such funds when no longer required for the purposes of the society; provided always, that any land to which the society may become absolutely entitled by foreclosure, or by surrender, or other extinguishment of the right of redemption, shall, as soon afterwards as may be conveniently practicable, be sold or converted into money. Preference shares may also be issued, and shall bear interest after the rate of 5 per centum per annum, payable half-yearly. Special arrangements

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may be made for advances on freehold, copyhold, or leasehold property on such terms as to interest and repayments as may be agreed upon."

The 40th rule of both societies as to "withdrawal of shares" was as follows: "On and after the expiration of the first twelve months, any member may withdraw the subscription money which he may have contributed, with such an amount of interest as may be determined by the committee, such member to give notice of his intention to withdraw in writing to the secretary, and should more than one member give notice to withdraw at one time, the member so giving notice shall be paid in rotation, according to the priority of notice, provided always that the said society shall not be required or obliged to make such payment as aforesaid until they have sufficient funds in hand for that purpose, and also to meet the then existing liabilities of the society."

It appeared that on the death in 1886 of one Wayman, the secretary to the ten societies, the books of the societies were placed in the hands of a firm of accountants. The report shewed that eight of the ten societies, among others the 36th and 32nd, were insolvent.

This report was, on February 14, 1887, submitted to an aggregate meeting of the shareholders of all the societies, and at this meeting a resolution was passed recommending the appointment of a general committee consisting of the directors and two delegates from each society to consider the affairs of all the societies.

A meeting of the 36th Society was held on February 17 following, and a meeting of the 32nd Society on February 16, and at these meetings it was decided to appoint delegates, according to the resolution of the aggregate meeting, and to send to each shareholder a copy of the report. The report shewed as regards the 36th Society a deficiency of upwards of 14,000*l.*, as regards the 32nd Society a deficiency certainly of upwards of 3000*l.*, and possibly of upwards of 7000*l.*

As regards the 36th Society, it was admitted that after February 17, 1887, "no new members were admitted, no new shares were taken out, no money was borrowed, no money was advanced to any member on mortgage, nor was any withdrawing member repaid." The same appeared to be the case as regards the 32nd

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Society, but between February 16 and May 3, 1887, that society received a sum of about 8*l.* in subscriptions and paid a sum of about 47*l.* by way of interest to paid-up shareholders, and held meetings to discuss suggestions for the alteration of certain of its rules.

On May 3, 1887, the general committee sent the following notice to each shareholder in the ten societies: "Owing to the request of the directors and delegates for the cancellation of withdrawal notices in order to arrange amalgamation not having met with a sufficient response, your directors feel it their duty to urge you to give immediate notice to withdraw the amount due on your shares, that you may not suffer any loss that can be avoided in the event of the scheme not being carried out."

On June 17, 1887, resolutions were passed for the voluntary winding-up of the societies. On July 2 the judge made an order for the continuance of the winding-up under the supervision of the Court. At the date of the decisions appealed against, the claims of outside creditors and depositors had, in the cases of the 36th and 32nd Societies, been paid.

In King's and Cordner's cases, the judge decided that the 36th Society was declared to be insolvent on February 17, 1887, and that, therefore, notices of withdrawal given by Mr. King and Mr. Cordner, subscription shareholders of 11*l.* 10*s.* and 20*l.* 15*s.* respectively, in the one case on February 21, 1887, in the other on May 6, 1887, did not entitle them to payment of their subscriptions in the winding-up in priority to other members. The shareholders appealed.

In Oliver's case, the judge decided that the 32nd society was declared to be insolvent on May 3, 1887, and that, therefore, a notice of withdrawal at the end of six months, given by Mr. Oliver, a holder of paid-up shares in the 32nd Society of the value of 2300*l.* on October 8, 1886, and maturing on April 8, 1887, entitled him to be paid in the winding-up in priority to all members whose notices expired after the latter date. The liquidator appealed.

In Wilkinson's case the judge decided that Mr. Wilkinson, the holder of paid up shares in the 36th Society of the value of 500*l.*, who on October 6, 1885, gave a notice of withdrawal at the end

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of six months maturing on April 6, 1886, was entitled in the winding up to interest at 5 per cent. from April 6, 1886, till payment. The certificate was in the following form: "This is to certify that . . . has this day paid to the Sunderland 36th Universal Building Society the sum of 500*l.*, as the full subscription or payment for 10 shares of 50*l.* in the said society, upon which sum interest at the rate of five pounds per centum per annum will be payable half yearly, the said . . . to be at liberty to withdraw the said sum at any time after the expiration of six months from this day upon giving six months' notice in writing to the secretary of the society, and the said Sunderland 36th Universal Building Society to be allowed to repay the same at any time on giving six months' notice to the said . . . Dated . . ." The liquidators appealed.

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Cozens-Hardy, Q.C., (*H. W. Eve*, with him), for the shareholders. The shareholders gave notice of withdrawal before July 2, the date of the winding-up order and the date, under s. 32, sub-s. 4, of the Building Societies Act, 1874, of the legal dissolution of the society. They are therefore entitled to be paid the amount of their subscriptions "according to priority of notice" under rule 40.

In the judgments of Lord Selborne and Lord Watson (*Brownlie* v. *Russell* (1)), in the House of Lords, the date of the winding-up order is treated as the date at which a shareholder in a building society ceases to be entitled to give a valid notice of withdrawal. If he has given notice of withdrawal before this date, *Walton* v. *Edge* (2), in the House of Lords, shews that he can claim payment in full in the winding-up in priority to shareholders who have not done so. The rule was applied by Kay and Pearson, JJ., in *In re Middlesborough and Redcar Permanent Building Society.* (3)

The order is based upon *Carrick* v. *North British Building Society* (4), a decision of the Scotch Court of Session. But there the building society was admitted "to have existed only for purposes of liquidation" from a period prior to the winding-up.

(1) 8 App. Cas. 235.
(2) 10 App. Cas. 33.
(3) 53 L. T. (N.S.) 203.
(4) 22 Scottish Law Reporter, 833.

Here the proceedings of the society before the winding-up did not amount to a declaration of insolvency.

Sir Horace Davey, Q.C., (*Haldane*, with him), for the liquidators. The argument for the shareholders was used in the House of Lords in *Tennent* v. *City of Glasgow Bank* (1). There a shareholder in an insolvent banking company sought to repudiate his shares. The action was commenced before the winding-up order, but after the bank had stopped payment. It was contended on his behalf that the date of the winding-up order was the defining period, but the House of Lords decided that the shareholder was too late, as he had not brought his action before the bank had become insolvent. Lord Cairns said, "*Oakes* v. *Turquand* (2), while it decided negatively that a contract could not be rescinded on the ground of fraud after a winding-up had commenced, did not decide affirmatively the converse proposition that up to the time of the commencement of a winding-up a contract to take shares could be rescinded on the ground of fraud." The same principle applies as regards notices of withdrawal. On its true construction rule 40 can only be meant to be effective as long as the society is capable of carrying on business and paying its debts. As soon as insolvency supervenes the rule ceases to apply. It would be highly inequitable and it cannot have been intended that a shareholder, by giving notice of withdrawal under this rule at a time when he knows that the society is for all practical purposes insolvent, should be able to obtain a right to payment of his subscription in full in the liquidation to the exclusion of his fellow shareholders.

In *Carrick* v. *North British Building Society* (3), there had been a declaration of insolvency and the society had ceased to carry on business two years before the winding-up. The Court held, on the authority of *Tennent* v. *City of Glasgow Bank* (1), that all notices of withdrawal given after the declaration of insolvency were invalid, and gave no right to payment in preference in the winding-up. Here the proceedings before the liquidation constituted a declaration of insolvency, and the society from February 17 ceased to be a going concern. The same principle,

(1) 4 App. Cas. 615. (2) Law Rep. 2 H. L. 325.
(3) 22 Scottish Law Reporter, 833.

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therefore, applies, and as the notices of withdrawal given by the shareholders were not given before that date, they are inoperative.

Cozens-Hardy, Q.C., in reply. *Tennent* v. *Glasgow Bank* (1), has no application. That case only decided that after a company has stopped payment, a recission of a contract to take shares cannot be permitted as against the outside creditors of the company. Here the outside creditors have been paid, and the question is as to the rights inter se of withdrawing and non-withdrawing shareholders in the liquidation. Sect. 153 of the Companies Act, 1862, expressly fixes the commencement of the liquidation as the date after which the status of a shareholder becomes unalterable.

OLIVER'S CASE.

R. T. Reid, Q.C., (*W. S. Robson*, with him), for the liquidator. The six months' notice given by the shareholder matured on April 8. The 32nd Society equally with the 36th was insolvent on February 17. The argument for the liquidators in the previous case, therefore, applies. It is also suggested that on its true construction rule 40 contemplates the existence of sufficient funds to pay not only outside creditors but all the shareholders in full. Here the society is not in a condition to meet its "existing liabilities" to non-withdrawing as well as to withdrawing shareholders.

Cookson-Crackanthorpe, Q.C. (*Wurtzburg*, with him), for the shareholder. The notice of the shareholder matured before July 2, the date of the winding-up order, and is therefore valid. If the validity of such notices depended on whether the society was or was not insolvent at the dates at which they were given, an inquiry as to the solvency of the society at those dates would in every case be necessary. This would be inconvenient, and s. 32 of the Building Societies Act, 1874, renders it unnecessary by specifically defining the events which are to have the effect of dissolving the societies. As a matter of fact all that the directors of the 32nd Society did in February was to circulate among the shareholders a balance sheet procured from accountants. That

(1) 4 App. Cas. 615.

they did not intend this proceeding to be a declaration of insolvency is shewn by the facts that money was received and paid by the society, and that alterations in the rules were discussed, between this date and that of the liquidation.

The argument for the shareholders in the previous case applies. The view of rule 40 which has been suggested neglects the words "payment according to priority of notice." Where there is enough for all claimants questions as to priority can scarcely arise. This construction is also contrary to the judgments in *Walton* v. *Edge* (1), in which a very similar rule was discussed.

R. T. Reid, Q.C., in reply.

WILKINSON'S CASE.

Haldane, (Sir *Horace Davey, Q.C.*, with him), for the liquidators. The shareholder is not entitled to interest. He is a preference shareholder under rule 3, and the interest payable to him half-yearly under the certificate is in the nature of a dividend. On the expiration of the notice of withdrawal, he ceased to be a preference shareholder entitled as such to a half-yearly dividend, and became a creditor of the society. In his capacity of creditor he is not entitled, either at common law or by the statute of William IV. or under any contract to be inferred from the rules, to interest on the sum due.

[He cited *In re Sheffield and South Yorkshire Permanent Building Society* (2), and *In re Blackburn District Building Society* (3).]

Cozens-Hardy, Q.C. (*Eve*, with him), for the shareholder. The shareholder is entitled to interest according to the terms of the certificate. A withdrawing shareholder continues to be a shareholder until he has been paid. In *Walker* v. *General Mutual Society* (4) it was held, in the Court of Appeal, that a dispute between the society and a withdrawing shareholder must be referred to arbitration, as there was a rule to that effect. It is also believed that it has been the practice of the society to allow interest in similar cases.

[The Court requested the county court judge to inquire into the

(1) 10 App. Cas. 33.
(2) 22 Q. B. D. 470.
(3) W. N. (1886), p. 22.
(4) 36 Ch. D. 777.

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question of what had been the practice of the society with respect to payment of interest to withdrawing shareholders. The results of the inquiry are stated in the judgment.]

Cur. adv. vult.

Jan. 31. The judgment of the Court (Lord Coleridge, C.J., and Mathew, J.), was delivered by Mathew, J.

RAWLINGS AND ANOTHER *v.* KING AND CORDNER.
RAWLINGS *v.* OLIVER.

These were appeals from orders made by the county court judge at Sunderland and raised the question whether the appellants King & Cordner, and the respondent Oliver, were entitled to rank as creditors of the societies in the winding-up proceedings, or whether they were still members.

They contended that they had withdrawn from membership in accordance with the rules of the societies before the winding-up order had been made, and had thus become creditors. The liquidators, on the other hand, contended that before the notices to withdraw from membership had been given or had become effective, the insolvency of the societies had become notorious, and, therefore, that the notices were inoperative.

The learned county court judge decided in favour of the liquidators in the cases of King and Cordner, and against the liquidator in the case of Oliver.

The order to wind-up was made on July 2, 1887. In the first case the appellant King had given notice of withdrawal on February 21, 1887, and the appellant Cordner on May 6, 1887. In the second case the respondent Oliver had given notice on October 8, 1886, of withdrawal at the end of six months. The contention on their part was that until the winding-up order had been actually made, they were entitled to withdraw and so to constitute themselves creditors of the societies. The liquidator insisted that the societies were known to be insolvent on February 17, 1887, and that the right which members would otherwise have had of quitting the societies was then at an end.

It appeared from the evidence that ten benefit building societies constituted in the usual way had been established in Sunderland, and that the management of them all had fallen into the hands

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of a person named Wayman. They were formed on what is called the terminating principle, and consisted of two classes of members, depositors and borrowers, or "advanced members." Unfortunately for the members of the societies under Wayman's control, there had been gross mismanagement, and after Wayman's death in August, 1886, it was discovered that a great part of the moneys of all the societies was not forthcoming. In the early part of 1887 a firm of accountants was employed to investigate the affairs of the different societies, and reports were prepared which shewed that each of them was insolvent. These reports with balance sheets were submitted to and practically adopted by an aggregate meeting of members of the societies on February 14, 1887. In pursuance of resolutions passed at the meeting, an effort was made to reconstruct the societies, and delegates were appointed to meet and consider what should be done. A scheme of reconstruction by amalgamating all into one was put forward by the delegates, but was found to be impracticable, and resolutions were finally come to that each of the societies should be wound-up under the supervision of the Court.

In support of the contention that at the date of the order King, Cordner, and Oliver were no longer members, they relied upon the rule as to withdrawal, which was in the following terms: "That on and after the expiration of the first twelve months, any member may withdraw the subscription money which he may have contributed, with such an amount of interest as may be determined by the committee, such member to give notice of his intention to withdraw in writing to the secretary, and should more than one member give notice to withdraw at one time, the member so giving notice shall be paid in rotation, according to the priority of notice, provided always that the said society shall not be required or obliged to make such payment as aforesaid until they have sufficient funds in hand for that purpose, and also to meet the then existing legal liabilities of the society." (1)

We are of opinion that this rule was not intended to apply where the society was no longer able to carry on its business, and where it had become notorious that the society could not meet its liabilities. It would be altogether unreasonable to suppose

(1) Rule 40, as above.

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that it was intended in the event of insolvency to permit one set of members to escape from liability at the expense of the others. There would seem to be no adequate consideration or motive for such an arrangement. The rule seems to us not to contemplate any such contingency as a suspension of its business, and, therefore, only to provide for a withdrawal from the society while it was, or was believed to be, still solvent. There was sufficient evidence to shew that before the times at which two of the notices were given, and the third became effective, the members, and all others who were interested, knew that the societies were no longer in a condition to carry out the objects for which they had been formed, or to fulfil their undertakings with their members. That the societies could not go on is shewn from the scheme of reconstruction laid before the members, which practically involved the liquidation of the affairs of each of the societies. In this state of things the right to withdraw, it appears to us, no longer exists.

The case of *Brownlie* v. *Russell* (1), referred to by counsel for the appellants, is only material for the reasons given for the view that the right to withdraw does not survive a winding-up order. As appears from the judgment of the Lord Chancellor, a winding-up order takes away the right because "it necessarily puts a close to the whole concern, terminates at the date the account of each shareholder, and cuts off all chance of profit which, if the thing had gone on, both classes of members might have had" (p. 254). But all these consequences were as clear and inevitable in the cases of these societies when the report of the accountant was published in February, 1887, as if a winding-up order had then been actually made. The case of *Walton* v. *Edge* (2) was relied upon by the learned counsel for the appellants as an authority for the proposition that members who gave effective notice before the date of the winding-up order were entitled to priority in payment to those members who had not given notice. But the question in that case was as to the rights of members "who gave notice not only before the winding-up, but when there was no information that any winding-up was going to take place, and when nothing special was alleged to affect them

(1) 8 App. Cas. 235. (2) 10 App. Cas. 33.

with notice that the society was not to continue as a going concern" (p. 36). The view we take is in accordance with the valuable judgment of Lord Shand in the case of *Carrick* v. *North British Building Society*. (1) It is not the order to wind up, but the state of things which to the knowledge of all concerned renders liquidation inevitable, that in such a case as this puts an end to the right to withdraw.

An effort was made on behalf of the persons seeking to withdraw to make out that, after the condition of the societies had been ascertained and made public by the reports of the accountants, the societies were still kept going. Reliance was placed upon the fact that some payments were afterwards made and received by the societies' officers. But the fact that the business of the societies was not wholly suspended is explained by the efforts which were being made to effect re-construction which turned out to be impracticable.

We, for these reasons, hold that the appellants, King and Cordner, and the respondent Oliver, are not entitled to priority, and that they must rank in the winding-up with the other members of the societies. We dismiss the appeals in the cases of King and Cordner and reverse the judgment of the Court below in the case of Oliver.

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In the third case the liquidators appealed against the judgment of the learned judge who held that members who had given effective notices of withdrawal before the insolvency was disclosed, but had not received the amounts due to them, were entitled to interest until payment. It was not contended that at common law or under the Statute of William IV. interest would be payable, but it was said that there was a course of dealing between the societies and their withdrawing members which was evidence of a contract to pay interest. After a further investigation of the facts made at our request by the learned county court judge a full statement of the evidence has been made to us by his Honour. We are of opinion that any claim for interest could only arise under the terms of rule 40, and that apart from that

(1) 22 Scottish Law Reporter, 833.

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rule there is no evidence of any contract express or implied to pay interest to members who had given notice to withdraw. That payments were made without the knowledge in the first instance of the committee is explained from the irregular way in which the business of the societies was conducted by Wayman. That such payments were ratified up to a certain date, when they were ordered by the committee to be suspended, is no proof that a liability under any contract existed or was admitted to exist. Any inference of an implied contract is repelled by the express provision in rule 40, that the interest, if any, should be such a sum as the committee might determine, and it was found by the judge that no determination within the meaning of the rule had been come to by the committee. The appeal in this case must therefore be allowed.

Orders accordingly.

Solicitors: *Maples, Teesdale & Co., for G. S. Lawson, Sunderland; Clarke, Rawlins, & Co., for Moore, Longden, & Mann, Sunderland; Wright & Pilley, for Storey, Sunderland.*

H. D. W.

Feb. 10, 14.

LAW GUARANTEE AND TRUST SOCIETY, LIMITED AND HUNTER *v.* THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND.

Banker—Bank of England—Mandamus—Registration of Transfer of Stock—Joint Tenancy and Tenancy in Common—Application to register Transfer of Stock in joint names of a Corporation and an Individual—5 & 6 Wm. & Mary, c. 20, s. 19—National Debt Act, 1870 (33 & 34 *Vict. c.* 71), *ss.* 1, 22.

The Court will not grant a mandamus requiring the Bank of England to register a transfer of consols in the joint names of a corporation and an individual.

CASE tried before Mathew, J., without a jury.

Application for a mandamus directing the defendants, the Governor and Company of the Bank of England, to transfer 533*l.* 9*s.* 8*d.* consols, standing in their books in the name of the plaintiff Hunter, into the joint names of the plaintiff company and the plaintiff Hunter. The defendants objected that they were under no obligation by virtue of 5 & 6 Wm. & Mary, c. 20,

s. 19, and the National Debt Act, 1870, to transfer stock into the joint names of a corporation and an individual.

It appeared that the consols were part of a trust estate, of which the plaintiff Hunter, as surviving trustee, had appointed the plaintiff company to be trustee in place of one Power, deceased, the plaintiff Hunter agreeing, by the deed of appointment, to transfer the stock into his own name and that of the plaintiff company.

R. S. Wright, (with him *Sir R. E. Webster, Q.C., A.G.*), for the plaintiffs. The plaintiffs are entitled to the mandamus. It is the duty of the defendants under s. 22 of the National Debt Act, 1870, to enter the transfer. Whatever question may arise upon the winding-up of the company or the death of the individual, the company and the individual are at present joint owners of the stock, and are entitled to be registered as such in the books of the Bank of England.

[He referred to *Wildman* v. *Wildman* (1), per Sir W. Grant, M.R.]

Sir H. Davey, Q.C., and *Pollard*, (*W. Latham* and *C. Musgrave* with them), for the defendants. The mandamus cannot be granted. The Bank of England is not bound to register a transfer of stock into the joint names of a corporation and a natural person. Where two natural persons are joint owners of stock their interest is a joint tenancy, and upon the decease of the one the survivor becomes absolutely entitled to the whole of the stock owing to the incident of survivorship which attaches to joint tenancy. The Bank has therefore in such a case no difficulty in recognising the authority of the survivor to transfer the stock. But a corporation and an individual can, according to law, only hold stock jointly as tenants in common, each taking a moiety according to the rule as to tenants in common. The result is, that if the plaintiff Hunter and the plaintiff company were registered as joint owners and the plaintiff Hunter died, the Bank could not allow the plaintiff company to transfer the stock without investigating the title of the personal representatives of the plaintiff Hunter and obtaining their concurrence. This is an obligation which the Bank is not bound to undertake.

(1) 9 Ves. 174.

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The legal incidents of joint tenancy and tenancy in common apply as well to personal estate, including choses in action, as to real estate, and a corporation and a natural person cannot be joint tenants, and can only be tenants in common as regards either real or personal estate: Blackstone's Commentaries, book ii., pp. 182, 183, 184; Coke upon Littleton, lib. iii., c. 3, s. 281 (181 b), and lib. iii., c. 4, s. 297 (190 a); Bacon's Abridgment, 7th ed. Joint Tenants (B); Comyn's Digest, 5th ed., vol. 4, p. 107; and Williams's Saunders, 5th ed., vol. 2, pt. 2, p. 318, n. 4. The reasons given by these authorities for the impossibility of such a joint tenancy are: first, that as a corporation has perpetual succession the incident of survivorship cannot arise between a natural person and a corporation; secondly, that the legal ownership of a natural person which passes to his heirs or to his personal representatives is so essentially different from the legal ownership of a corporation with perpetual succession that the two estates are regarded by the law as incapable of coalescing in the manner necessary for the creation of joint tenancy.

Rolle's Abridgment, vol. 2, p. 91, "Joint Tenants and Tenants in Common," contains an instance of the application of the rule of law to a bond, the obligee under which has a chose in action analogous to that possessed by a holder of consols. It is there said: "If M. by his obligation holds himself bound to the Dean and Chapter of York and A. B. and C. D. in 2000 marks; in that case the Dean and Chapter are tenants in common with A. B. and C. D., because a body politic having a several capacity from bodies natural cannot hold jointly with them.... For that reason, after the death of A. B. and C. D., the Dean and Chapter cannot bring an action for this obligation alone, but must join with them, the executors."

The question is of importance not only to the Bank of England as bookkeeper for the holders of consols, but to all public bodies which keep registers of stock or shares. Such bodies ought not to be required to solve at their peril difficult and technical questions of construction arising on deeds and wills. Here the plaintiffs are trustees. It is the rule to make trustees joint tenants for the better protection of the trust estate, and such a joint tenancy is evidently contemplated in the deed of appointment. But if the

defendants, conceiving the co-plaintiffs to be tenants in common by operation of law, registered them as such, and then allowed the one on the supposition of his being a tenant in common to transfer a moiety of the stock without the concurrence of the other, they might be called upon to replace the fund: *Sloman* v. *Bank of England.* (1)

Sir R. E. Webster, Q.C., A.G., in reply. Under the interpretation clause of the National Debt Act, 1870, the defendants are bound to register corporations as well as individuals as holders of stock. It follows that they are bound to register a corporation and an individual as joint holders. Admitting that the cases cited, though they chiefly refer to real property, contain dicta suggesting that the rules as to joint tenancy and tenancy in common in the case of realty apply to chattels and choses in action, it nowhere appears from them that the law prohibits a settlor from constituting a corporation and an individual co-trustees in order to give the settled fund the additional security arising from the continuous existence of the corporation. The case in Rolle's Abridgment arose upon a mere question of pleading.

[He referred to *Crossfield* v. *Such.* (2)]

Cur. adv. vult.

1890. Feb. 14. MATHEW, J. This was an action brought by the Law Guarantee and Trust Society Limited and John Hunter, for a mandamus requiring the Governor and Company of the Bank of England to register a transfer of stock made to the co-plaintiffs jointly. The defendants refused to do so on the ground that they were not bound to register a corporation and an individual as joint-owners of stock.

It was admitted by the learned counsel on both sides that the practice of the Bank of England, as custodian for the Government of the records of the different funds which form the National Debt, has always been to register only absolute owners of stock, and in cases of joint ownership to treat the owners as joint tenants, and to deal with them as having the legal estate, to use old phraseology, in the property transferred to them of

(1) 14 Sim. 475.

(2) 8 Ex. 825.

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which they claim registration. This practice, it was said, probably had its origin in the difficulties attending the creation of limited and successive interests in personal property. The usual course was to interpose trustees, and the Bank dealt with trustees as having the legal estate, and was thus exonerated from having any regard to the subordinate interests which the trustees were brought into existence to protect. It was said that this course of business was recognised by the courts of law, and the case of *Crossfield* v. *Such* (1) was referred to. That case certainly shews that the Bank of England is supposed to deal only with the legal estate, and that in a case where stock is registered in joint names the owners hold the stock as joint tenants with the ordinary right of survivorship, and the Bank may safely deal with the survivor, as representing the whole interest in the stock. It was further said that in the National Debt Act of 1870, which now regulates the operations of the Bank with respect to holders of stock, there is no indication of any intention on the part of the legislature that the defendants shall deal with any but the legal owners of the stock registered, while it expressly exonerates them from having regard to trusts of any kind.

Such being the practice and such the effect of the statute, it was submitted on the part of the defendants that the result was that the Bank were not bound to register a transfer of stock to persons as tenants in common. It was argued that the effect of such a transfer, if the Bank could be called on to register it, would be to impose on the Bank the obligation of ascertaining what the interests in the stock were; in other words, to enter upon such an investigation as it is expressly exonerated from making by the provision of the statute, which relieves the Bank from the necessity of following trusts. Tenants in common, it was said, do not necessarily have equal interests in the stock of which they are tenants in common, and upon registration the Bank would have imposed on it the duty of ascertaining the share of each tenant in common, and at each devolution of the property a similar investigation might have to be held.

All this appeared to be in a great measure conceded by the counsel for the plaintiffs; but it was asked what was the practical

(1) 8 Ex. 825.

difficulty of the Bank in the present case? Here was a transfer to this trust company and the co-plaintiff, which purported to be a transfer to the two jointly; why should the Bank object to register such a transfer any more than one in which the transferees were individuals? The object of the transfer was plain, and any man of business would know what was intended—viz., that the individual should be empowered to act as trustee during his lifetime, and that on his death the whole interest should pass to the company. What difficulty, then, need there be? Why was this technical obstacle presented to what would seem to be a very convenient course of dealing with the stock? The answer of the counsel for the defendants was, What you call a transfer to the company and the co-plaintiff does not operate to create a joint tenancy, because it is impossible to create a joint tenancy between a company and an individual. Therefore what you ask the Bank to do is to recognise a tenancy in common between owners of stock; and this the Bank has never been required to do, and, for the reasons which have been given, ought not to be required to do.

To establish this position recourse was had to ancient law. It was pointed out by the learned counsel for the defendants that unquestionably in the case of real estate an assignment of property to an individual and a corporation would not create a joint tenancy, but a tenancy in common. From Coke upon Littleton, 190 A, Williams's Saunders, vol. ii., pt. 2, p. 318, note 4, Blackstone's Commentaries, and the other ancient text-writers which were cited, it no doubt appears that an attempt to create a joint tenancy in a corporation and an individual must fail, for two reasons. In the first place the grantees take in different capacities. The grant to the corporation is a grant to the corporation and its successors; the grant to an individual is a grant to the individual and his heirs; and those two estates cannot be blended in the manner necessary for the creation of a joint tenancy. Further, there cannot be a right of survivorship between the grantees, and this right is an indispensable incident of a joint tenancy. The further proposition was to my mind satisfactorily made out that these rules embrace the cases of personal chattels and choses in action. The case cited from

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Rolle's Abridgment appeared to be a direct authority on the point.

These propositions were not controverted by the learned counsel for the plaintiffs. They merely sought to cast ridicule upon the conduct of the Bank in adhering to rules which they referred to as "obsolete" and "old-fashioned," and against which they invoked the robust common-sense of modern times. "True," they said, "there may be these old rules; but the Court ought to look to the substance of this transaction. The manifest intention here is to create a joint tenancy, and the Court ought to give effect to that manifest intention." I by no means say that it would be beyond the resources of conveyancing to devise a form of assignment which would have this effect, but the plan adopted here is a simple transfer to the company and the co-plaintiff. It is said that as the transferrees are in fact trustees, a transfer in this simple form is sufficient indication that they are intended to hold the stock as joint tenants. But in the face of the statute, which expressly says that the Bank is not to pay attention to the fact that holders of stock are trustees, I do not think that the Bank is bound to have regard to the element of trusteeship at all, and I think that if the Bank registered a transfer into the names of trustees under such circumstances it would be establishing a precedent, and that the next step might be to call upon it to register such transfers where the holders were beneficiaries and not merely trustees.

I have, therefore, to consider what the position of the Bank would be, supposing a tenancy in common in stock to be created between this company and this individual. I am not satisfied that the Bank would be safe without investigating what share each of the tenants in common had when this original transfer was registered; nor do I think that the Bank would be safe when any subsequent devolution of the property took place without ascertaining how the shares went—a difficult investigation. In the case of a joint tenancy a death, as I have already pointed out, creates no difficulty. The Bank is entitled to treat the survivor as absolute owner. I am asked now to say that the Bank ought to depart from what is conceded to be its established practice in these matters—ought to go from old ways to new

ways. I feel that the case is one which requires the utmost judicial caution. I have to bear in mind the enormous interests with which the Bank has to deal, and the serious liabilities that may be incurred if there be any departure from the ordinary method of dealing with stock. I do not think that Sir Horace Davey succeeded in pointing out the exact difficulty which might arise in case the Bank permitted this transfer. But I have to deal not with probabilities merely but with possibilities in this case, and I cannot avoid the apprehension that if, for instance, an individual who was a tenant in common of stock under a transfer to a company and himself as trustees, was minded to commit a breach of trust, the Bank might be placed in a position of some difficulty. Suppose, for example, that an assignment were made by such a person of his share of the trust estate, I by no means say that it would be impossible to extricate the Bank from the conflicting claims that might be made upon it in such a case. Probably the resources of the Court would be found extensive enough, by interpleader or otherwise, ultimately to relieve the Bank of England from the necessity of taking part in the proceedings; but before that point was reached there might be a troublesome and difficult investigation, and I do not see that the burden of such an investigation ought to be cast upon the Bank of England.

I therefore do not feel at liberty to grant this mandamus. At the same time, what is proposed to be done by the plaintiffs in this case would seem to be highly convenient and a fair transaction, and I regret that there should be this technical difficulty in the way. While this technical difficulty exists the Court must give effect to it. It can only be removed by the intervention of the legislature. My judgment is, therefore, for the defendants, with costs.

Judgment for the defendants.

Solicitors for the plaintiffs: *Torr, Janeways, Gribble & Oddie.*
Solicitors for the defendants *Freshfields & Williams.*

H. D. W.

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Jan. 25, 27, 28.

THE GUARDIANS OF THE HEADINGTON UNION *v.* THE GUARDIANS OF THE IPSWICH UNION.

Poor Law—Illegitimate Child, Settlement of—Place of Birth—Mother living—Onus of proof as to Settlement of Mother—4 & 5 Wm. 4, c. 76, s. 71.

On appeal against an order of removal of an illegitimate child under the age of sixteen years, whereby such child was adjudged to be settled in the place of its birth, it was admitted by the respondents that the child's mother was still living, but no evidence was given to shew that she had any settlement, nor, on the other hand, was there any evidence of failure by the respondents to make inquiries:—

Held, that in the absence of proof that the mother had a settlement elsewhere, the burden of which proof—there being no evidence of a failure by the respondents to make inquiries—was upon the appellants; the child must be deemed to be settled in the place of its birth.

CASE stated by quarter sessions on appeal against an order of removal.

The pauper, Alice Mary Beckley, was an illegitimate child under the age of sixteen years, and the order of removal adjudged the place of her last legal settlement to be in the parish of Headington, which was the place of her birth. The notice of chargeability and grounds of removal sent to the appellants stated the following as the particulars of the pauper's settlement in the appellants' union:—

"The said Alice Mary Beckley was the illegitimate daughter of Alice Beckley, and was born on the 14th day of August, 1880, at Headington Workhouse, in the parish of Headington, in your union above named."

On the hearing of an appeal against the order it was admitted by the respondents that Alice Beckley, the mother, was still living; but no evidence was given to shew that she had any settlement, nor, on the other hand, was there any evidence of failure by the respondents to make inquiries. The appellants contended that in the case of an illegitimate child under the age of sixteen, with a mother still living, there was no presumption that the place of its birth was its place of settlement, and that before such child could be adjudged to be settled in the place of

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its birth there must be an inquiry into the settlement of the mother. The recorder, however, held that the birthplace of such a child was to be taken to be its place of settlement until the contrary was proved, and that the burden of such proof was upon the appellants. He accordingly affirmed the order.

Bosanquet, Q.C., and *Shortt*, for the appellants. By 4 & 5 Wm. 4, c. 76, s. 71, every illegitimate child born after the passing of that Act shall have and follow the settlement of its mother until it shall attain the age of sixteen or acquire a settlement in its own right. Since that Act the mother's settlement takes precedence of the child's birth settlement. The respondents, therefore, were only entitled to remove the child to the Headington Union in the event of her mother either being settled in Headington, or having no settlement at all. The onus lay on them to shew that such was the case. The presumption is that every person has some settlement. In *Reg.* v. *St. Paul's Covent Garden* (1), where it was sought to remove an illegitimate child under sixteen to the place of its birth, it was held that the removing parish were bound to prove that the child was born before the passing of the Act, and so to exclude the possibility of its being entitled to the settlement of its mother.

R. C. Glen, and *J. F. P. Rawlinson*, for the respondents. The onus is upon the appellants to shew that the mother of the child had a settlement elsewhere than in Headington. In *Reg.* v. *Yelvertoft* (2), where the father of the pauper had never done any act to gain a settlement for himself, it was held that the pauper might be removed to the mother's maiden settlement without proving any inquiry made into the birth settlement of the father. In *Rex* v. *Barton Turfe* (3), where a girl of fourteen was removed to the place of her mother's settlement, it was held unnecessary to state in the order of removal that the pauper had not gained a settlement for herself. These cases shew that it is primâ facie enough for the removing parish to shew some settlement; it is for the other side to displace it by shewing a better one elsewhere. Moreover, there was a presumption that the pauper's mother was

(1) 7 Q. B. 232. (2) 6 Q. B. 801.

(3) 2 Bott. & Const. 22.

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settled in Headington. A child is primâ facie born where its mother was domiciled, that is to say, where she was settled: per Brett, M.R., *Guardians of Headington Union* v. *Guardians of St. Olave's Union.* (1)

Shortt, in reply.

POLLOCK, B. I was at first inclined to think that this case was concluded by the decision in *Reg.* v. *St. Paul's, Covent Garden* (2), but on reflection I am satisfied that it is not so. The notice of chargeability and of the grounds of removal in this case was confined to a statement that the pauper was an illegitimate child under the age of sixteen years, and was born in the parish of Headington. And the question which we have to determine is practically whether or not that notice is a good and sufficient notice. It was contended by the appellants that the case of *Reg.* v. *St. Paul's, Covent Garden* (2) was an authority that it was not. But to my mind that case proceeded not upon the ground of insufficiency of notice to the appellants, but upon the ground of the want of jurisdiction in the magistrates to make the order, having regard to the ambiguity of the evidence upon which it was made. There the mother of the pauper loosely stated in her examination that the child was born "in or about the year 1833," a statement which was consistent with the child having been born after August, 1834, the date of the coming into force of the 4 & 5 Wm. 4, c. 76, in which event it would have taken its mother's settlement, if she had one, in preference to its own birth settlement. The magistrates chose upon that evidence to find that the child was born before August, 1834, and the Court held that finding to be bad. Williams, J., said: "The examination referring to a point of time when the exact date might be so material, the words 'in or about' want the requisite particularity. We must hold that the examination is too loose." And Wightman, J., said: "It is so difficult to say what limits will satisfy the word 'about,' that where time is so material it ought to be better ascertained than it can be by that expression. I am not prepared to hold that 'in or about the year 1833' may not mean after August, 1834." The ambiguity of the evidence

(1) 13 Q. B. D. 299.

(2) 7 Q. B. 232.

upon which the order was made was an objection which at that day was fatal.

But further, if the examination in that case be treated as a notice of grounds of removal, it was a bad notice, in that it did not give sufficient information to the other side as to the settlement upon which the removing parish were relying, that is to say, whether they were relying on a birth settlement of the child in the parish of St. Paul's, or on a settlement of the mother in that parish. The removing parish are bound to inform the other side clearly what their case is, so that they may know what they have got to meet, and what counter evidence they must prepare. And it was to this that Lord Denman presumably was referring when in the course of the argument he said, "It is sufficient for parish officers to tell all they know, if that which they do tell makes the settlement clear. But if they state what leaves this doubtful it may make the whole case bad." But the present case is very different, for here it was perfectly clear upon the face of the notice that the only settlement relied upon was the birth settlement of the child. And no persons conversant with the subject could, upon receipt of the notice, have failed to see that the only question upon which they were challenged was whether the child's mother had got a settlement elsewhere, and that if they were prepared to resist the removal they must make inquiries and ascertain that matter for themselves. It seems to me, therefore, that this appeal must be dismissed.

HAWKINS, J. In this case the only question is whether or not the recorder was wrong in holding that the child was settled in the parish in which it was born. The notice sent to the appellants stated very clearly the grounds upon which the child was sought to be removed, and gave them all the information upon the subject of its settlement which it was apparently in the power of the respondents to give. This is a totally different case from that of *Reg.* v. *St. Paul's, Covent Garden* (1). In that case the examinations, which were required to be sent to those who were called upon to receive the pauper, for the purpose of giving them information as to the grounds of removal, were

(1) 7 Q. B. 232.

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objected to on the ground that they stated that the pauper was born "in or about the year 1833," (which might include any part of the year 1834), and consequently left it doubtful whether the child was entitled to a settlement according to the law as it stood before August 14, 1834, or whether it was entitled to the mother's settlement as provided by the Statute of Wm. 4, and the Court held the objection to be well founded. But here every particular which is necessary to set forth the ground upon which the child is claimed to be settled in the appellant parish is clearly given. And the only question is whether or not, in the absence of any information as to the mother having no settlement, the recorder was justified in holding upon the evidence before him that the child was settled in the parish of Headington. Now I take it for granted that when the notice of the grounds of removal was sent to the appellants, those who advised them knew perfectly well what the law was, namely, that if the mother of an illegitimate child under sixteen had a settlement the child would take that settlement, and that if the mother's settlement was in a parish other than that in which the child was born it would be improper to remove the child to the place of its birth. And though the appellants had the same means of ascertaining whether the mother had any settlement that the respondents had, it does not appear that they made any inquiries or took any pains to ascertain that fact. But then it is said that they were relieved from the necessity of so doing because there is a presumption that every person must have a settlement of some kind, and no doubt that is true of English-born subjects, for such persons must at the least have a birth settlement; but there is no presumption that a person is born in one parish rather than in another, and moreover, here there is nothing even to shew that the mother was born in England at all.

It seems to me perfectly clear that if in such a case as the present the onus of proof lies upon the removing parish to establish that the mother has no settlement, it must equally lie upon a parish which seeks to remove a legitimate child under sixteen to the place of its birth to establish that its parents have no settlement; for the settlement which a legitimate child derives

from its parents overrides its birth settlement in precisely the same manner as the birth settlement of a bastard child is displaced by the settlement which, since the Act of Wm. 4, it takes from its mother. To this extent legitimate and illegitimate children stand on the same footing. But there is abundant authority to shew that in the case of legitimate children the onus of proof does not lie on the removing parish. In *Rex* v. *Heaton Norris* (1), where it was proved that a pauper was born in the parish of Beard, and it appeared also in evidence that his father resided and kept a public-house many years at Bolton, yet as the father's settlement was not actually proved the Court held that the place of the pauper's birth must be deemed his place of settlement. In *Rex* v. *Whixley* (2), where the pauper's mother proved that he was born at Halaugh, although she also proved that her husband (who was still living) had before his marriage served two years in another parish, but whether under a yearly hiring or not she could not say; as the father's settlement was not actually proved, it was held that the place of the pauper's birth must be deemed his place of settlement. Again in *Rex* v. *Woodsford* (3), where a woman was removed as "Mary Pitman, widow," and the place of her birth only was proved, the Court held that it must be deemed her place of settlement. I am therefore of opinion that the recorder was right in the view that he took, and that he was, upon the materials before him, entitled to treat the birthplace of this child as the place of its last legal settlement.

Appeal dismissed.

Solicitors for appellants: *Philpot & Son, for Hawkins, Ward & Higgs, Oxford.*

Solicitors for respondents: *Rexworthy, for Vulliamy, Ipswich.*

J. F. C.

(1) 6 T. R. 653.

(2) 2 Bott. & Const. 13.

(3) Cald. 236.

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[CROWN CASE RESERVED.]

THE QUEEN *v.* WHITCHURCH AND OTHERS.

Criminal Law—Conspiracy to procure Abortion—Woman not with Child—Liability for Conspiracy—24 & 25 Vict. c. 100, *s.* 58.

A woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion.

CASE stated by Wills, J.

At the assizes for the county of Northampton on November 28, 1889, Thomas William Whitchurch, John Howe, and Elizabeth Cross were indicted in the following terms:—The jurors, &c., present that Thomas William Whitchurch, John Howe, and Elizabeth Cross, believing that the said Elizabeth Cross was then pregnant and that in due course of nature she would be delivered of a child begotten by the said John Howe, and wickedly intending and contriving to conceal such pregnancy and to prevent such her delivery in due course of nature, on June 1, 1889, did amongst themselves unlawfully, knowingly, and wickedly conspire, combine, confederate, and agree together feloniously and unlawfully to procure the miscarriage of the said Elizabeth Cross by unlawfully administering to and causing to be taken by her certain noxious things, and by unlawfully using certain instruments and other means, with intent to procure the miscarriage of the said Elizabeth Cross. The indictment then set out a number of acts done in pursuance of the conspiracy, but it is unnecessary for the purposes of this case to set out more of the indictment than I have already given. The evidence established that the prisoners all believed that Elizabeth Cross was pregnant, and that for the purpose of procuring abortion Whitchurch and Howe, with her consent and by her procurement, both administered to her noxious drugs and used, or caused to be used, upon her, instruments; but there was no evidence that she was in fact pregnant, and for the purposes of the present case it must be taken that she was not in fact pregnant. Mr. Hammond Chambers then objected that for a woman not being pregnant to do, or

cause to be done, acts upon herself for the purpose of procuring abortion was no offence either at common law or by statute, and therefore she could not be convicted of conspiracy with other persons that they should do upon her and she should suffer the same acts. I was of opinion that, whether or not it was no offence for a woman not pregnant to do acts to herself intending thereby to procure an abortion which was actually impossible, it would none the less be criminal in her to conspire to commit a felony (which the administration of drugs and the use of instruments would have been in her as well as in the men if she had been pregnant—see 24 & 25 Vict. c. 100, s. 58), because the commission of the felony was rendered impossible by circumstances unknown to her. I was further of opinion that for the woman to conspire with the men to have certain things done to her, the doing of which constituted a felony on the part of the men, was criminal, although the object to be attained, if effected by herself alone and without the help of the men, might not have been criminal, and I directed the jury, if they believed the evidence, to convict the prisoners. The jury convicted all the prisoners. The men had been previously convicted of the felony of administering drugs and using instruments for the purpose of procuring the miscarriage of the female prisoner. The question for the Court was whether the conviction against the woman could be sustained.

Hammond Chambers, for the prisoner, Elizabeth Cross. The conviction is wrong, because the prisoner is charged with conspiring to do an act which, if actually done, would not be a crime on her part. To procure abortion was not a crime at common law, but is made a crime by statute, and the statute now in force (24 & 25 Vict. c. 100, s. 58 (1)), expressly provides that for a

(1) By 24 & 25 Vict. c. 100, s. 58, "Every woman being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever, with the like intent, and whosoever with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony."

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woman to administer drugs to herself, or use instruments on herself, with intent to procure abortion, is a crime only in the event of the woman being with child, in contradistinction to the case of other persons, on whose part the act is criminal whether the woman is with child or not.

The following authorities were referred to: *Rex* v. *Turner* (1); *Rex* v. *Fowle* (2); *Reg.* v. *Rowlands* (3); *Reg.* v. *Esdaile* (4); *Reg.* v. *Collins* (5); *Reg.* v. *Warburton* (6); *Reg.* v. *Boulton.* (7)

Etherington Smith, for the prosecution, was not called on.

LORD COLERIDGE, C.J. I am of opinion that the conviction ought to be affirmed.

The question arises on an indictment charging a woman, who, we must take it, was not in fact with child, with conspiring with others to procure abortion on herself. There might have been something to be said if the indictment had been for an attempt to procure abortion, for in that case the words of the section would not apply. This, however, is an entirely different case. The prisoner is charged with the offence of conspiracy—that is, a combination to commit a felony—and I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, although the person on whom the offence was intended to be committed could not, if she stood alone, be guilty of the intended offence.

POLLOCK, B. I am of the same opinion.

HAWKINS, J. I am of the same opinion.

The prisoner is not charged with using instruments, or administering drugs to herself, for the purpose of procuring abortion, but with conspiring with others to procure abortion. It is clear that she could not lawfully call in other persons to do that which when done by them is a crime punishable with penal servitude. What she did was a conspiracy to commit a criminal act.

(1) 13 East, 228.
(2) 4 C. & P. 592.
(3) 2 Den. C. C. 364; 17 Q. B. 671.
(4) 1 F. & F. 213.
(5) L. & C. 471; 33 L. J. (M.C.) 177.
(6) Law Rep. 1 C. C. 274.
(7) 12 Cox, C. C. 87.

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GRANTHAM, J. In stating the law as to conspiracy in the case of *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), Lord Coleridge, C.J., said: "In an indictment it suffices if the combination exists and is unlawful, because it is the combination itself which is mischievous, and which gives the public an interest to interfere by indictment." (2) This shews that the conviction in the present case was right.

CHARLES, J. I am of the same opinion.

Conviction affirmed.

Solicitor for prosecution: *The Solicitor to the Treasury.*
Solicitor for prisoner: *Becke & Green, Northampton.*

P. B. H.

Dictum of HAWKINS, J., at p. 433, *applied.* R. *v.* THOMAS. [1949] 2 All E.R. 662.

Feb. 1, 8.

[CROWN CASE RESERVED.]

THE QUEEN *v.* MILES.

Criminal Law—Practice — Previous Conviction — Summary Conviction for Assault—Subsequent Indictment for same Assault—24 & 25 Vict. c. 100, *ss.* 44, 45—*Summary Jurisdiction Act,* 1879 (42 & 43 *Vict. c.* 49), *s.* 16.

A person who has been convicted of an assault by a court of summary jurisdiction, but has been discharged, without any sentence of fine or imprisonment, on giving security to be of good behaviour, cannot afterwards be convicted on an indictment for the same assault.

CASE stated by the Recorder of London.

At the session of the Central Criminal Court, held on December 16, 1889, George James Miles was arraigned on an indictment which charged him in the first count with unlawfully and maliciously wounding Charles Living; second count, unlawfully inflicting grievous bodily harm on the said Charles Living; third count, assaulting the said Charles Living, and thereby occasioning him actual bodily harm; fourth count, a common assault on the said Charles Living; fifth count, a common assault on Harry Anstey. The prisoner handed in a special plea in bar of his prosecution so far as the first four counts of the indictment were

(1) 21 Q. B. D. 544; affirmed 23 Q. B. D. 598.
(2) 21 Q. B. D. at p. 549.

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concerned, and pleaded not guilty as to those counts and the fifth count, and a special reply was put in by the prosecution.

The evidence offered by the defendant in support of his plea consisted of an examined copy of a record of the Court of Summary Jurisdiction sitting at West Ham and of evidence that the offences charged in the first four counts of the indictment related to the same matter as the offence mentioned in the said record. [The record is set out in the judgments.] The counsel for the prosecution did not dispute that the first four counts of the indictment referred to the same matter as the offence mentioned in the said record. I determined to hear the facts of the case upon the plea of not guilty, and, if necessary, to reserve the point raised on the pleadings for the consideration of this Court. The defendant was ultimately convicted on the first four counts of the indictment, and acquitted on the fifth count, and I reserved the question of the sufficiency of the plea in bar for the opinion of this Court.

The question for the opinion of the Court was whether the proceedings before the Court of Summary Jurisdiction against the defendant in respect of the assault upon Charles Living, were a bar to the proceedings against him at the Central Criminal Court by indictment for the same offence. (1)

(1) By 24 & 25 Vict. c. 100, s. 44: "If the justices, upon the hearing of any such case of assault or battery upon the merits, where the complaint was preferred by or on the behalf of the party aggrieved, under either of the last two preceding sections, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."

By s. 45:—"If any person against whom any such complaint as in either of the last three preceding sections mentioned" (common assaults or batteries and aggravated assaults on females and boys under fourteen years of age), "shall have been preferred by or on the behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 16:—

"If upon the hearing of a charge for an offence punishable on summary conviction under this Act, or under any other Act, whether past or future,

1889. Feb. 1. *Poland, Q.C.* (*Warburton*, with him), for the defendant. The conviction cannot be supported. It is a second conviction for an offence for which the defendant has already been convicted, and both at common law and by statute the previous conviction is a bar to further criminal proceedings for the same offence: *Reg.* v. *Walker* (1); *Reg.* v. *Elrington* (2); *Wemyss* v. *Hopkins* (3); *Holden* v. *King.* (4)

So far as relates to criminal proceedings, the statutes only affirm the principle of the common law. The prosecution at the trial relied upon the words contained in 24 & 25 Vict. c. 100, s. 45, "having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment, or imprisonment with hard labour, awarded." That, however, only means the fine or imprisonment, if any, and does not exclude from the operation of the section a case like the present, where no sentence of fine or imprisonment was passed. Even if this were not so, s. 16 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), removes all difficulty. See the rules made under that Act, and especially Form 17. The prosecution also relied on *Hartley* v. *Hindmarsh* (5), but the answer is that in that case the

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the Court of Summary Jurisdiction think that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment,"

* * * *

"(2) The Court, upon convicting the person charged, may discharge him conditionally on his giving security, with or without sureties, to appear for sentence when called upon, or to be of good behaviour, and either without payment of damages and costs or subject to the payment of such damages and costs, or either of them, as the Court think reasonable."

In the schedule to the Summary Jurisdiction Rules, 1886, a Form of Conviction (with security) is given (Form 17), the material parts of which are as follows:—

"Before the Court of Summary Jurisdiction sitting at, &c., the day of, &c. , A. B. (hereinafter called the defendant), is this day convicted for that he, &c. But the Court being of opinion that the said offence was of so trifling a nature that it is inexpedient to inflict any [*or* any other than a nominal] punishment, and the defendant having given security to the satisfaction of this Cour to appear for sentence when called upon [*or* to be of good behaviour], he is discharged."

(1) 2 M. &. R. 446.

(2) 1 B. & S. 688; 31 L. J. (M.C.) 14.

(3) Law Rep. 10 Q. B. 378.

(4) 46 L. J. (Ex.) 75.

(5) Law Rep. 1 C. P. 553.

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conviction was not proved, and it rather appears as if in fact there never was any conviction. If there is anything in the earlier Act inconsistent with the Summary Jurisdiction Act, 1879, it is repealed by s. 55.

Lockwood, Q.C. (*Besley*, with him), for the prosecution. The contention on behalf of the defendant imports the words "if any" into 24 & 25 Vict. c. 100, s. 45, but there is no provision in the Summary Jurisdiction Act, 1879, or in any other Act of Parliament, which can be construed as having that effect. The express words of s. 45, and the decision in *Hartley* v. *Hindmarsh* (1), are conclusive in favour of the prosecution.

[LORD COLERIDGE, C.J., referred to *Reg.* v. *Bird.* (2)]

Poland, Q.C., replied.

Cur. adv. vult.

1890. Feb. 8. The following judgments were delivered.

HAWKINS, J. The indictment in this case contains five counts. It is, however, only necessary to notice the first, second, third, and fourth, for upon the fifth the defendant was acquitted generally upon a plea of not guilty.

The first count charged an indictable offence under s. 20 of 24 & 25 Vict. c. 100, namely, that on October 26, 1889, at the parish of West Ham the defendant *unlawfully and maliciously did wound* one Charles Living.

The second count charged an indictable offence under the same section, namely, that on the same day, and at the same place, the defendant unlawfully and maliciously did *inflict grevious bodily harm* in and upon the said Charles Living.

The third count charged an indictable offence under s. 47 of the same Act, namely, that on the same day, and at the same place, the defendant unlawfully *did assault* the said Charles Living, and beat, wound, and ill-treat him, *thereby occasioning to him actual bodily harm.*

The fourth count charged an indictable offence under the same section, namely, that on the same day at the same place the defendant unlawfully did assault the said Charles Living, and beat, wound, and ill-treat him.

(1) Law Rep. 1 C. P. 553. (2) 2 Den. C. C. 94.

To these four counts the defendant pleaded not guilty, and also a plea in bar founded upon the 45th section of the same Act of Parliament, a copy of which plea forms part of the case. The material allegations contained in that plea are: that on October 28, 1889, the defendant was *upon the complaint of the said Charles Living, duly convicted* before the Court of Summary Jurisdiction sitting in and for the borough of West Ham, "for that he, the defendant, on October 26, 1889, *did unlawfully assault and beat the said Charles Living*, and that the said Court being of opinion that the said offence was of so trifling a nature that it was inexpedient to inflict *any other than a nominal punishment*, the defendant having given security to the satisfaction of the said Court to be of good behaviour, *was discharged*." The plea then alleges that the "*assault and battery*," of which the defendant was so convicted, and the *wounding, assault and battery in the first four counts of the indictment mentioned are one and the same assault and battery*, and not other and different.

No question arises on the form of the reply, which substantially puts in issue the validity of the plea.

On the trial before the recorder of London the defendant was found guilty upon each of the said counts, subject to the validity and proof of his special plea, in support whereof the record of the conviction before the Court of Summary Jurisdiction was put in, and it must be taken as found by the jury upon due proof that the first four counts referred to *the same matter* as the offence mentioned in the record of the summary conviction.

The enactments under which the plea in question is pleaded are ss. 44, 45 of the statute relating to offences against the person (24 & 25 Vict. c. 100). Sect. 42 enacts that where any person shall unlawfully assault or beat any other person, two justices of the peace may, *upon complaint by or on behalf of the party aggrieved*, hear and determine such offence, and upon conviction such justices may either fine the offender a sum not exceeding 5*l.* or commit him to prison for a term not exceeding two months. The assaults mentioned in this section are in s. 43 referred to as "*common assaults and batteries.*" Then comes s. 44, which enacts: "If the justices upon the hearing of any such case of assault or battery upon the merits shall deem the offence *not to be proved*,

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or shall find the assault and battery to have been justified, *or* so trifling as not to merit any punishment, *and* shall accordingly *dismiss the complaint*, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."

By s. 45 it is enacted: "If any person against whom such complaint shall have been preferred *by or on the behalf of the party aggrieved*, shall have obtained such certificate, *or*, having been convicted, *shall have paid the whole amount adjudged to be paid*, or shall have suffered the imprisonment, or imprisonment with hard labour, awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for *the same cause*."

The record of the proceedings before the justices is in these terms:—

"West Ham Police Court, in the borough of West Ham, before the Court of Summary Jurisdiction, sitting at the Police Court, West Ham Lane, &c., the 28th day of October, 1889, George James Miles (hereinafter called the defendant) is this day convicted, for that he on the 26th day of October, 1889, within the borough of West Ham did *unlawfully assault and beat* one Charles Living. *But the Court being of opinion that the offence was of so trifling a nature that it is inexpedient to inflict any other than a nominal punishment*, and the defendant having given security to the satisfaction of this Court to be of good behaviour, is discharged."

This conviction was under the hand and seal of the police magistrate for the borough of West Ham.

It is obvious that if the defence rested solely upon the provisions of the 24 & 25 Vict. c. 100, above set forth, grave objections might be made to its validity, for the case was not dismissed, and, even had it been so, no certificate of dismissal was given to the defendant. Moreover, although the record alleges that the defendant was convicted, and intimates the inexpediency of inflicting more than a nominal punishment, that nominal punishment is not fixed or determined, either as to its character or amount, and it will be noted that fine and imprisonment are the

only punishments contemplated by the 42nd section. Therefore no averment could be truly made that the defendant has paid the fine or suffered the imprisonment awarded. The case of *Hartley* v. *Hindmarsh* (1) would, as it seems to me, be in point against the plea, had the provisions of the 24 & 25 Vict. stood alone.

By the Summary Jurisdiction Act, 1879, however (42 & 43 Vict. c. 49), which was passed long after the decision of *Hartley* v. *Hindmarsh* (1), important discretionary power was vested in justices, as to the infliction of punishment, and as to the discharge, without punishment, upon convictions for offences punishable upon summary conviction.

By s. 16 of that statute it is enacted that "If upon the hearing of a charge for an offence punishable upon summary conviction, the Court of Summary Jurisdiction think that, though the charge is proved, the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, *or any other* than a nominal punishment;"

Sub-sect. 1: "The Court, *without proceeding to conviction*, may discharge the information, and, if the Court think fit, may order the person charged to pay such damages, not exceeding 40*s*., and such costs of the proceeding, or either of them, as the Court think reasonable;" or

Sub-sect. 2: "The Court upon convicting the person charged may discharge him *conditionally* on his giving security, with or without sureties, *to* appear for sentence when called upon, *or* to be of good behaviour, and either without payment of damages and costs, or subject to the payment of such damages and costs, or either of them, as the Court think reasonable."

In cases of assault where the complaint is dismissed, it seems to me that a certificate of dismissal is still necessary to entitle a defendant to the benefit of the provisions contained in s. 45 of 24 & 25 Vict. But in cases where the justices, though they have convicted, think the offence deserving only of a nominal punishment, or of no punishment at all, and, acting under the power contained in the second sub-section, determine to discharge the defendant *without any punishment on his giving merely security*

(1) Law Rep. 1 C. P. 553.

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to be of good behaviour, and such security is given, I am, without expressing any settled opinion upon the point, strongly inclined to think that nothing more is necessary to entitle him to the privileges conferred by the 24 & 25 Vict. c. 100, s. 45. For I think the giving of security for good behaviour under such circumstances is intended as a substitute for punishment, and that the effect of such substitution, coupled with the performance of the condition—i.e., the giving the security for good behaviour—would place the defendant precisely in the same position as if punishment had actually been inflicted and suffered. It certainly never could have been intended by the legislature that a person whose offence at the most deserved nothing beyond a nominal punishment, which had been foregone on his recognizances for good behaviour, should be in a worse position than a person whose offence had been visited by a substantial punishment which he had suffered. There may be, and I think are, objections to the form of the plea as framed, but, thinking as I do, that the common law defence I am about to refer to is such as entitles the defendant to have the conviction in question quashed, it is not necessary to discuss them upon the present occasion. I would, however, observe that, inasmuch as these common law defences to the indictment would afford no defence to civil proceedings, it would be expedient in future, if justices desire to give to a defendant the protection afforded by the 44th and 45th sections of the 24 & 25 Vict., that they should found their proceedings and judgment upon the provisions of that Act, rather than upon the later Summary Jurisdiction Act, the provisions of which are not very clear, and when they were framed the previous enactments of 24 & 25 Vict. were evidently not clearly remembered by the draftsman. The justices will do well also to bear in mind that they may also award damages under the later statute if they think right to do so. With regard to the common law defence relied on as an answer to this indictment, it is not strictly a plea of autrefois convict (except as to the fourth count, which charged a mere common assault), because the defendant had never previously been actually convicted of either of the offences in the form in which they are charged in the first three counts; but it was a defence grounded, as Blackburn, J., said in

Wemyss v. *Hopkins* (1), "on the well-established rule at common law that whenever a person has been convicted and punished for an offence by a Court of competent jurisdiction, transit in rem judicatam—that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence." (2) This rule of law so stated has never been doubted or qualified in any one of the numerous authorities which are to be found in the books upon the subject, though it has not always been found easy to apply the rule to the facts of particular cases under discussion. In the case cited (*Wemyss* v. *Hopkins* (1)), where the appellant had been summarily convicted by justices under the Highway Act, 5 & 6 Wm. 4, c. 50, s. 78, for an offence which, though charged as a mere offence against the Highway Act, amounted also to an assault in law, it was held that he could not afterwards be convicted upon the same facts of an assault under s. 42 of 24 & 25 Vict. c. 100. That was a case too clear to admit of a reasonable doubt, and is a good illustration of the general rule of law. The difficulties which have arisen in the application of the rule have most frequently occurred in cases where a conviction or acquittal for a simple offence has been set up as a bar to a subsequent charge against the same person in a more aggravated form, and the law, as deducible from the numerous cases to be found on the subject, seems to be this—that where a criminal charge has been adjudicated upon by a Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence, whether with or without circumstances of aggravation, and whether such circumstances of aggravation consist of the offence having been committed with malicious or wicked intent, or by reason that the committal of the offence was followed by serious consequences. In this respect the criminal law is in unison with that which prevails in civil proceedings. Who ever heard of a new action prevailing after a verdict and judgment for damages for the same cause of action, simply on the ground that the damages were

(1) Law Rep. 10 Q. B. 378.

(2) Law Rep. 10 Q. B. at p. 381.

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insufficient, or that the conduct of the defendant was, since the verdict and judgment, discovered to be more malicious than it was deemed to be at the trial? Judgment recovered in a former action was always a good plea in bar. In *Reg.* v. *John Walker* (1) it was held by Coltman, J., that a conviction for an assault by wounding before justices was a bar to an indictment for the same assault and wounding with felonious intent to maim, disable, and do grievous bodily harm. In *Reg.* v. *Stanton* (2) the prisoner was indicted for wounding with intent to murder. He had previously been convicted and punished summarily for a common assault, founded upon the same facts. The jury found the prisoner guilty of a common assault. In answer to a question of Erle, J., why the previous conviction had not been pleaded, it was said there was a difficulty in pleading a conviction for an assault to a charge of felony, whereupon that learned judge said that, in his opinion, the conviction would, if pleaded, have been an estoppel to the judgment for the *felonious* assault, and, though not pleaded, he treated the charge as having been adjudicated upon. Ten years later the same point was decided in *Reg.* v. *Elrington* (3), where to an indictment for assault and maliciously wounding and causing grievous bodily harm, &c., a plea that on the hearing of a charge for the same assault treated as a common assault before justices, they had dismissed the complaint, was held to be a bar. The true ground upon which these decisions were based seems to me to be that the summary conviction or dismissal of the charges in each case operated as an absolute bar to any future proceedings for or in respect of the same *assault;* and as the aggravating circumstances, unless coupled with the assault, amounted to no crime, there was nothing to support the indictment. No doubt it seems a little startling that a conviction for a common assault, accompanied by a shilling fine or a dismissal of the complaint as too trifling for any punishment, should afford an answer to a subsequent indictment for that same assault, upon conclusive evidence that it was accompanied by an intent to murder; but reason and good sense point out that, even at the risk of occasional miscarriages of justice, when once a criminal charge has

(1) 2 M. & R. 446. (2) 5 Cox C. C. 324 (1851).
(3) 1 B. & S. 688.

been adjudicated upon by a Court having jurisdiction, that adjudication ought to be final, and, after all, such miscarriages are very rare. No system of judicature can be suggested in which occasionally failure to insure complete justice may not arise. After the most solemn and careful trial of an indictment for murder, resulting in the acquittal of the person charged, it may happen that within a week the most cogent and conclusive proof of his guilt may come to light, or he may actually confess his crime. Yet his first acquittal is final. So with justices of the peace. After a summary conviction or dismissal of a charge upon which they have lawfully adjudicated, evidence may be discovered which would probably have induced them to come to an opposite conclusion. Yet, as in the case of an acquittal or conviction upon an indictment, their acquittal or conviction upon complaint within their jurisdiction is equally final, and their decisions upon matters within their jurisdiction cannot, as I have already shewn, be altered by presenting the same charge in the shape of an indictment before a jury in an aggravated form. But it is not every summary conviction or acquittal for a common assault which will operate as a bar to an indictment for an offence in which that assault was an element. It could hardly be contended that a previous conviction for a common assault could be pleaded in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. For the offence of murder consists in the *felonious killing*. So also of manslaughter: see *Reg.* v. *Morris*. (1) So, again, a conviction for a common assault could not be pleaded in bar to an indictment for *rape*, though possibly it might be for an assault with intent to commit rape; for the essence of the crime of *rape* is a felonious assault *by penetration of the person of the prosecutrix*, which justices have no jurisdiction to adjudicate upon, and although it is quite true that, on a charge of common assault, evidence may be given of circumstances which, *if true*, would constitute a rape, and true also that the justices must form in their own minds an opinion as to the credibility of that evidence with a view to determining whether their jurisdiction to deal with the matter has been ousted or not, and true also that if they

(1) Law Rep. 1 C. C. 90.

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disbelieve that evidence they may nevertheless believe that *an* assault, though not one of the particular character constituting a rape, has been committed, and convict the person charged accordingly, as was done in *Wilkinson* v. *Dutton*. (1) Their conviction, nevertheless, would be no bar to an indictment for rape, for though incidentally they might be obliged to consider the evidence in order to determine whether they had jurisdiction over the charge before them, they would have no jurisdiction whatever to adjudicate upon the offence of rape, and their disbelief of the evidence would have no greater effect upon the charge of rape than if they had simply refused to commit for trial upon it, in which case nobody would question that an indictment might be presented by anybody who was dissatisfied with the justices' refusal. This subject was a good deal discussed in the Court of Exchequer in *In re Thompson*. (2) It might be suggested that it may so happen that justices take a grievously erroneous view of the facts presented to them, and that, by convicting of a common assault when the facts point to a serious felony, justice may be defeated and a great criminal may escape the punishment due to his crime. True it is that it may so happen; so it may that a judge or jury may take an erroneous view of facts presented to them. For this there is no remedy. Such misfortunes are mere accidents, and of very rare occurrence, and are very unlikely to happen by reason of any default of the justices if they will pursue, as I am sure they ever endeavour, the simple course of steadily bearing in mind the charge before them. If that charge be one of felony, or misdemeanor punishable by indictment only, they have no jurisdiction to adjudicate; they can but commit for trial or refuse so to do. In matters before them upon which they are called upon to *adjudicate* they *must* do so, *unless* they have upon the facts an alternative to send for trial upon indictment. In assault cases especial provision is made to this effect by s. 46 of 24 & 25 Vict. c. 100, by which "Provided that, in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any

(1) 32 L. J. (M.C.) 152. (2) 6 H. & N. 193; 30 L. J. (M.C.) 19.

adjudication thereupon, and shall deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same." In the case before us the doubts I once entertained are removed—the one and same assault of which the defendant was convicted is the sole foundation upon which the conviction at the Central Criminal Court is rested, although aggravations are added to it which at first sight make the offences appear different—more particularly the count for wounding; but I find it alleged and found as a fact that that wounding formed part of the assault and battery of which the defendant was convicted, as well it might, without amounting to an unlawful and *malicious* wounding, which is purely an indictable offence under s. 20 of 24 & 25 Vict. This is recognized law: see *Reg.* v. *Taylor*. (1) For the reasons I have given I am now satisfied that the conviction before us ought to be quashed.

POLLOCK, B. (read by Hawkins, J.) This conviction ought, in my opinion, to be quashed. If the question depended solely upon whether the previous conviction pleaded by the prisoner was a good bar to the present indictment, as coming within the provisions of the 24 & 25 Vict. c. 100, s. 45, I should pause before I came to such a conclusion, as the language of this section is certainly not in accord with that of s. 16 of 42 & 43 Vict. c. 49. My decision is based on the broader ground that the conviction pleaded and the evidence given in support of it formed a good bar at common law to the present indictment. That indictment, by the first four counts, charged the prisoner in different forms with wounding and inflicting bodily harm on Charles Living. The prisoner, by his plea, alleged that he on a certain day was upon the complaint of the said Charles Living, duly convicted before a Court of Summary Jurisdiction, for that he did unlawfully assault and beat the said Charles Living, and the Court being of opinion that the offence was of so trifling a nature that it was inexpedient to inflict any other than a nominal punishment, the prisoner having given security to the satisfaction of the Court to be of good behaviour, was discharged, as by the record appeared, which judgment and conviction still remained

(1) Law Rep. 1 C. C. 194; 38 L. J. (M.C.) 106.

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in force; and in support of this plea he produced the conviction, which was in the following form:—"The 28th day of October, 1889; George James Miles (hereinafter called the defendant) is this day convicted for that he on the 26th day of October, 1889, did unlawfully assault and beat one Charles Living; but the Court being of opinion that the said offence was of so trifling a nature that it is inexpedient to inflict any other than a nominal punishment, and the defendant having given security to the satisfaction of this Court to be of good behaviour is discharged."

This is a good conviction and within the jurisdiction of the magistrate under 42 & 43 Vict. c. 49, s. 16 (The Summary Jurisdiction Act, 1879.)

At the trial it was proved on behalf of the prisoner, and admitted by counsel for the prosecution, that the first four counts of the indictment referred to the same matter as the offence mentioned in the record. In substance, therefore, the plea and the evidence establish that there was but one offence, and that the acts done by the defendant in respect of which he was convicted, by whatever legal name they might be called, were the same as those to which the indictment referred, and therefore the rule of law Nemo debet bis puniri pro uno delicto applies, and if the prisoner were guilty of the modified crime only he could not be guilty of the same acts with the addition of malice and design. In *Reg.* v. *Walker* (1), it was held that a plea of autrefois convict of an assault before magistrates is a bar to an indictment for feloniously stabbing in the same transaction. *Reg.* v. *Stanton* (2) is to the same effect. These are decisions by single judges, but they were cited and approved of by the Court of Queen's Bench in *Reg.* v. *Elrington* (3), where Cockburn, C.J., says:—"We must bear in mind the well-established principle of our criminal law that a series of charges shall not be preferred, and whether a party accused of a minor offence is acquitted or convicted he shall not be charged again on the same facts in a more aggravated form." This is not only the law, but it is consonant with sound sense and the just treatment of defendants. One case only was cited by the prosecution, which might at

(1) 2 M. & R. 446.

(2) 5 Cox C. C. 324.

(3) 1 B. & S. 688.

first sight seem to be contrary to this view, viz., *Hartley* v. *Hindmarsh* (1), but upon looking at the decision in that case it will be found that the conviction was not pleaded as a bar at common law, but under the statute 24 & 25 Vict. c. 100, s. 45; and the judgment of the Court proceeded upon the grounds that there was no record of any conviction, and further that the magistrate did not adjudicate upon the case, but, as a conservator of the peace, ordered the defendant to enter into recognizances.

CHARLES, J. (read by Lord Coleridge, C.J.) George James Miles was indicted at the December sessions of the Central Criminal Court, before the Recorder of London for (1) unlawfully and maliciously wounding Charles Living; (2) unlawfully inflicting on him grievous bodily harm; (3) assaulting him and occasioning him actual bodily harm; (4) common assault. He pleaded to these four counts that he "was, on the complaint of the said Charles Living, duly convicted before the Court of Summary Jurisdiction for the borough of West Ham, for that he, the said George James Miles, on October 26, 1889, did unlawfully assault and beat the said Charles Living, and the said Court being of opinion that the said offence was of so trifling a nature that it was inexpedient to inflict any other than a nominal punishment, the said George James Miles having given security to the satisfaction of the said Court to be of good behaviour was discharged, as by the record of the said conviction more fully and at large appears, which said judgment and conviction still remains in force and effect, and not in the least reversed or made void, and George James Miles further sayeth that the assault and battery of which he was so convicted, and the wounding, assault, and battery in the first four counts mentioned, are one and the same assault and battery, and not other and different." The record of the conviction was, so far as is material, as follows:—

"G. J. Miles, hereinafter called the defendant, is this day convicted for that he, on October 26, 1889, did unlawfully assault and beat one Charles Living, and the Court being of opinion that the said offence was of so trifling a nature that it is inex-

(1) Law Rep. 1 C. P. 553.

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pedient to inflict any other than a nominal punishment, and the defendant having given security to the satisfaction of this Court to be of good behaviour, is discharged."

This plea was proved at the trial; indeed it was not disputed that the offences charged in the first four counts related to the same matter as the offence mentioned in the record, but counsel for the prosecution argued that the record did not disclose any conviction within the meaning of 24 & 25 Vict. c. 100, s. 45, the Court having neither ordered the defendant to pay a fine nor to be imprisoned. The counsel for the defendant argued that by 42 & 43 Vict. c. 49, s. 16, sub-s. 2, express power was given to the magistrate upon convicting a person of assault to discharge him conditionally on his giving security to be of good behaviour, and that 24 & 25 Vict. c. 100, s. 45, must be read with the section above referred to. The defendant was convicted on the first four counts of the indictment, and the Recorder reserved the following question for the opinion of the Court: "Whether the proceedings before the Court of Summary Jurisdiction against the defendant in respect of the assault on Charles Living were a bar to the proceedings against him at the Central Criminal Court for the same offence?" The answer to this question does not, in my opinion, in any way depend on the construction of the 45th section of 24 & 25 Vict. c. 100, and the 16th section of 42 & 43 Vict. c. 49. I think the proceedings were a bar apart from any statutory provision, and that the conviction should be quashed in accordance with the well-established rule at common law—that where a person has been convicted for an offence by a Court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence. This rule has been acted on again and again, and I can see no reason why it should not be acted on in this case. It cannot be material that a magistrate has power by statute to deal with a convicted person otherwise than by fine or imprisonment, for it is the conviction and not the nature of the sentence which constitutes the bar. The principle is that no man shall be placed in peril of legal penalties more than once on the same accusation. This being the view which I take of the case, it is unnecessary to decide whether the defendant is entitled to the protection provided by 24 & 25 Vict.

c. 100, s. 45. I may add that upon the question reserved no point arises on the form of the special plea, which, however, I think may be regarded as an informal plea of autrefois convict.

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LORD COLERIDGE, C.J., and GRANTHAM, J., concurred with the judgment of Charles, J.

Conviction quashed.

Solicitors for prosecution: *Seeley & Son.*

Solicitor for defendant: *Sharman.*

P. B. H.

[CROWN CASE RESERVED.]

Feb. 1.

THE QUEEN *v.* JAMES.

Criminal Law—Larceny—Post Office—Causing Postman to intercept Letter—Liability as Principal or Accessory—24 & 25 Vict. c. 94, s. 1.

A person who induces a servant of the Post Office to intercept and hand over a letter, which is in course of transmission by the post, is either guilty of larceny as a principal felon, or is accessory before the fact to the larceny committed by the servant of the Post Office, and in either view can be convicted on an indictment charging him with larceny of the letter.

CASE stated by Stephen, J.

On November 27, 1889, Nathan James was convicted at Gloucester for stealing a post-letter, the property of the Postmaster-General, from Edward Hopkins James, an officer of the Post Office, under the following circumstances. Nathan James was a servant of Messrs. Burlingham & Co., and it was his duty to take orders and receive money on their behalf. He sent his books to their office at Evesham every half-year. The books ought to shew what customers were indebted to Messrs. Burlingham and for what amounts. The accounts due were made out to the debtors and sent to them by post. Shaw made a list of the customers by whom such letters would be received. He gave it to several postmen and asked them to give him such letters as arrived for those persons in Messrs. Burlingham's envelopes. He collected the sums due from them and kept back the letters from Messrs. Burlingham & Co. claiming payment. He was thus enabled to appropriate the money he collected, which he did in about thirty instances, the letters being found in his possession.

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Edward Hopkins James said the prisoner said to him, "'Will you retain certain letters that are coming through the post from Messrs. Burlingham, as they are accounts that have been paid in to me, and I don't want people to have them after they have paid their account?' I said I thought it was wrong, and he afterwards said to me if any one was to suffer he would, not me." In consequence E. H. James gave Shaw a good many of the letters in question instead of delivering them to the persons to whom they were addressed. The learned judge directed the jury that if they believed this evidence it proved that both Nathan James and E. H. James were guilty of theft. If this direction was right, the conviction was to be affirmed; if wrong, it was to be quashed.

No counsel was instructed for the prisoner.

Gwynne James, who had defended the prisoner at the trial, referred, as amicus Curiæ, to *Rex* v. *Butteris* (1); *Reg.* v. *Gruncell.* (2)

Staveley Hill, Q.C., and *Cleave*, for the prosecution, were not called on.

LORD COLERIDGE, C.J. I can entertain no doubt in this case. Either the prisoner was a joint thief with the postman from whom he obtained the letter, or he was an accessory before the fact, in which case, by 24 & 25 Vict. c. 94, s. 1, he was liable to be convicted in all respects as if he were a principal felon. In either case, therefore, he was rightly convicted.

POLLOCK, B., concurred.

HAWKINS, J. The prisoner was a thief, either as principal felon at common law, or as accessory before the fact by statute, 24 & 25 Vict. c. 94, s. 1. In either case he was guilty.

GRANTHAM and CHARLES, JJ., concurred.

Conviction affirmed.

Solicitor for the prosecution: *The Solicitor to the Post Office.*

(1) 6 C. & P. 147 (2) 9 C. & P. 365.

P. B. H.

PARNELL *v.* WALTER AND ANOTHER. 1890 *Jan.* 11.

Practice—Interrogatories—Action for Libel—Payment into Court—Sufficiency of Answer—Inquiry as to extent of Circulation of Newspaper—Inquiry as to source of Information.

In an action for libels contained in a newspaper and a pamphlet, accusing the plaintiff of being the author of certain discreditable letters, copies of which were printed in the libels, the only defence being payment into Court of 40*s*., which the defendants alleged to be enough to satisfy the plaintiff's claim, the plaintiff delivered interrogatories, asking, by the first and second, as to the extent of the circulation of the newspaper and pamphlet, and, by the others, as to the names of the persons from whom the letters were obtained, what was paid for them, and what inquiries were made, and what steps taken, to test and verify the information supplied to the defendants.

The defendants answered, as to the first two interrogatories, admitting a large circulation, but declining to answer further, on the ground that the information required could not be obtained without a difficult and troublesome inquiry, that the answer would involve disclosure of the defendants' business transactions, and that the precise number of copies issued was not material or relevant, and declining to answer the other interrogatories on the grounds that they were irrelevant and not material, and that their object was to discover the evidence to be adduced in support of the defendants' case, and that they were unreasonable, unnecessary, and vexatious, and not put bonâ fide for the purposes of the action, but for the purpose of criminating third parties, not parties to the action, and that the matters inquired into related solely to the defendants' case.

On an application by the plaintiff for an order for a further answer:—

Held, that as to the first and second interrogatories, the defendants were bound to answer further, stating approximately the extent of the circulation, but that the other interrogatories were not sufficiently relevant or material to entitle the plaintiff to an answer.

APPEAL from an order made at chambers directing a further answer to interrogatories.

The action was for libel.

The publications complained of were, first, certain numbers of *The Times* newspaper, in which it was alleged that the plaintiff was the author of certain letters, copies of which were printed in *The Times*; and, secondly, a pamphlet entitled "Parnellism and Crime," printed, published and circulated by the defendants, in which a copy of one of the same letters was printed, and in which it was alleged that the plaintiff was the author of the letter.

The only defence on the record was that the defendants paid

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40*s.* into Court, which they said was enough to satisfy the plaintiff's claim.

The interrogatories administered by the plaintiff, and the defendants' answers, were as follows:—

1. How many copies of each of the numbers of *The Times*, dated respectively April 18, 1887, July 6th, 1888, and July 7, 1888, were issued to the public and circulated by sale or otherwise?

Answer.—As to the first interrogatory, *The Times* newspaper, as is notorious, has a large and general circulation, and the numbers referred to were issued and circulated in the ordinary and usual way, and not otherwise. We decline to state the number of copies issued to the public and circulated on the grounds that we do not know the number, and have not the means of ascertaining it without a difficult and troublesome inquiry of persons not connected with the paper and its publication, and who are not under any obligation to give us the information, and the answer would involve a disclosure of the business transactions of the defendant Walter and of other persons (not parties to this action) who are his partners in the publication of *The Times*, and that the precise number of copies issued to the public is not material or relevant to any matters in question in this action.

2. At what date was the pamphlet entitled "Parnellism and Crime" first issued in that form as a separate publication to the public? At what date (if any) was the public circulation of the said pamphlet stopped? How many editions of the said pamphlet and how many copies of each such edition were issued and circulated by sale or otherwise between the said dates?

Answer.—In reply to the second interrogatory, the pamphlet "Parnellism and Crime" was first issued in that form as a separate publication to the public on or about March 18, 1887. The public circulation of the said pamphlet was stopped on or about February 27, 1889. A large number of copies of the said pamphlet were issued and circulated and sold by newsvendors at bookstalls and other places throughout the United Kingdom. We object to answer further the second interrogatory on the grounds stated in our answer to the first interrogatory with reference to the public circulation of *The Times*.

3. From what person or persons, and at what date or dates, did you, or some other and what person representing *The Times*, obtain the originals of each of the four alleged letters of the plaintiff set out in the statement of claim, and purporting to be dated respectively May 15, 1882, January 9, 1882, and June 16, 1882?

4. What sum or sums of money, and at what date or dates, and to whom, did you, or any other and what person representing *The Times*, pay for each of the alleged letters or for all of them?

5. State precisely what inquiries you, or any other and what person representing *The Times*, made of the person or persons from whom the alleged letters and each of them were obtained—(*a*) as to the person or persons to whom the letters were addressed, or (*b*) as to the person or persons from whom, or the place in which, or the means by which the person or persons from whom *The Times* obtained the same had got possession of the alleged letters, or any and which of them.

6. State precisely what information, if any, was given to you, or any other and what person representing *The Times*, and at what date or dates, by the person or persons from whom the alleged letters were obtained, and whether in answer to the inquiries suggested in the fifth interrogatory or otherwise (*a*) as to the person or persons to whom the letters were addressed, (*b*) as to the person or persons from whom, or the place in which, or the means by which the person or persons from whom *The Times* obtained the same had got possession of the alleged letters, or any and which of them.

7. State precisely, with dates, the steps, if any, taken by you, or by any other and what person representing *The Times*, to test or verify the information, if any, given by the person or persons from whom the letters were obtained as to the several matters mentioned in the sixth interrogatory, or any of them.

8. State precisely what steps, if any, and whether by the comparison of handwriting or otherwise, and how, were taken by you, or any and what person representing *The Times*, between the date when the said alleged letter of May 15, 1882, was obtained by *The Times* and April 18, 1887, to ascertain or test the genuineness of the said alleged letter.

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9. State precisely what steps, if any, and whether by the comparison of handwriting or otherwise, and how, were taken by you, or any and what person representing *The Times*, between the date or dates when the alleged letter of January 9, 1882, and the two alleged letters of June 16, 1882, were obtained by *The Times* and July 6 and 7, 1888, or either of the two last-mentioned dates, to ascertain or test the genuineness of the said three alleged letters, or any and which of them.

10. When did you, or any and what person representing *The Times*, first learn, and how, that the alleged letters, or any and which of them, had been obtained by the person or persons from whom *The Times* obtained the same from or through Richard Pigott? What inquiries, if any, did you then or subsequently, and when, make, and of whom, and how, as to the antecedents or character or repute of Richard Pigott?

Answer.—We decline to answer the remainder of the interrogatories on the grounds that they are irrelevant and not material to any matters in question in this action, and that the object of the plaintiff in administering these interrogatories is to discover the evidence we propose to adduce in support of our case, and that the interrogatories are unreasonable, unnecessary, and vexatious, and are not put bonâ fide for the purposes of this action, but for the purpose of criminating third parties who are not parties to this action, and that the matters inquired into relate solely to the defendants' case.

The master ordered a further answer to all the interrogatories. The defendants appealed to Field, J., who referred the matter to the Court.

Lumley Smith, Q.C., and *W. Graham*, for the defendants. No further answer to the first and second interrogatories ought to be ordered: *Moore* v. *Craven*. (1)

As to the others, although the questions might no doubt be asked in cross-examination of a witness called to support a defence of justification or privilege, it is clear from the authorities that in a case like the present, where the only issue is as to the amount of damages, such questions are inadmissible in the form

(1) Law Rep. 7 Ch. 94, note.

of interrogatories. They "do not relate to any matters in question in the cause," and are therefore excluded by the proviso at the end of Order XXXI., r. 1; *Kelly* v. *Sherlock* (1); *Marriott* v. *Chamberlain* (2); *Hennessy* v. *Wright* (3); *McColla* v. *Jones* (4); *Gibson* v. *Evans.* (5)

(1) Law Rep. 1 Q. B. 686.
(2) 17 Q. B. D. 154.
(3) 1888. July 6.

[IN THE COURT OF APPEAL.]

HENNESSY *v.* WRIGHT (No. 2).

APPEAL by the plaintiff from the decision of Manisty and Stephen, JJ., refusing to order a further answer to interrogatories.

The action was brought by Sir John Pope Hennessy, the Governor of Mauritius, against the publisher of *The Times*, for libel.

The alleged libel consisted of a statement, published in *The Times*, that the plaintiff, as Governor of Mauritius, had sent to the Secretary of State for the Colonies garbled accounts of certain proceedings in the colonial assembly.

This statement was contained in a letter from a correspondent at Mauritius, and in a leading article commenting on the letter.

The defendant pleaded that the alleged libels were parts of fair and accurate accounts and reports of public proceedings of the council of the colony, and fair and reasonable comments upon matters of public interest and notoriety, and were published bonâ fide and without malice, and under such circumstances as to render the publication privileged, and that the alleged libels were true in substance and in fact.

The plaintiff delivered the following interrogatories:—(1) From what person or persons was the information obtained upon which were based respectively the several alleged fair and accurate accounts in the defence mentioned? (2) Give the name of the person or persons by whom the alleged fair and accurate reports mentioned were made or taken, and of the person or persons who transmitted them to *The Times*. (3) Had the person or persons from whom the information in the first interrogatory mentioned was obtained any and what previous connection with *The Times* as correspondent or otherwise? Had he on any other and what occasion supplied *The Times* with information or articles or correspondence? (4) Give the name of the person or persons who wrote or contributed the letter or article published in *The Times* on August 25, 1886. (5) Was or was not the communication in the fourth interrogatory mentioned the first received from the author or contributor thereof? (6) Did you or the editor or any other and what person on your or his behalf, or that of *The Times*, at any and what time or times make any and what inquiry as to the antecedents or reliability of the person or persons who supplied the information in the first interrogatory mentioned and the person or persons who made or transmitted the report in the second interrogatory mentioned, and the writer of the letter or article in the third interrogatory mentioned. If yea, say what you or the editor or such other person learnt about him or

(4) 4 Times Reports, 12.

(5) 23 Q. B. D. 384.

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them. (7) State whether you or the editor or any other person engaged in the production of *The Times* have at any time received any and what information from any and what persons or sources as to the person or persons who supplied the information, reports and letter, or article hereinbefore mentioned. (8) Have you not, or has not some other and what person or persons in your service or under your control at some and what time had in his possession or custody the original or other manuscript from which the matter published on August 25, 1886, headed "Port Louis, August 3," was printed; if yea, say whether such manuscript contained or bore the name or address of any and what person or any and what written character whatsoever other than those printed and published. If you or such other person have had possession or custody of such manuscript, say what was done with it by you or him, and to whom you or he parted with the possession.

The defendant made an affidavit in answer in which he said: "I object to answer the interrogatories upon the grounds that the said interrogatories are irrelevant and do not relate to any matters in question in this action, and that they are not put bonâ fide for the purposes of this action, and that I am advised and believe that I am not bound to disclose the names of persons who will probably be my witnesses on the trial of the present action, and as to the eighth interrogatory that it inquires as to contents of a written document."

The defendant had made an affidavit of documents in his possession, in which he had made no reference to the original manuscript of the correspondent's letter.

Denman, J., refused to order the defendant to give a further answer, and this decision was affirmed by the Divisional Court (Manisty and Stephen, JJ.).

The plaintiff appealed.

1888. July 6. *Lockwood*, *Q.C.*, and *Cagney*, for the plaintiff. The object of the interrogatories was to ascertain what steps the defendant took to inform himself whether the correspondent was a trustworthy person, with the view of shewing that he was actuated by malice. A man who without any inquiry accepts a statement as true from a person whom he does not know to be trustworthy does not stand in so good a position as a man who makes full inquiry. The plaintiff is entitled to know whether the communication came from an apparently respectable person.

They referred to *Stevens* v. *Sampson* (5 Ex. D. 53); *Davison* v. *Duncan* (7 E. & B. 229); *Merivale* v. *Carson* (20 Q. B. D. 275); *De Crespigny* v. *Wellesley* (5 Bing. 392).

Lumley Smith, *Q.C.*, and *W. Graham*, for the defendant. The interrogatories are not really put for the purposes of the action. The defendant admits the publication of the alleged libel, and says that the statements of fact are true, and that the comments upon them are fair. There is no question of privilege: *Merivale* v. *Carson* (20 Q. B. D. 275). The questions to be tried are, whether the facts are truly stated, and whether the comments upon them are fair. The name of the correspondent is not material to the issues in the action. The plaintiff is really endeavouring to cross-examine the defendant upon his affidavit of documents, and this is not permitted.

They also referred to *Robertson* v. *Wylde* (2 M. & R. 101); *Clark* v. *Newsam* (1 Ex. 131); *Nicholl* v. *Wheeler* (17 Q. B. D. 101).

Lockwood, *Q.C.*, replied.

LORD ESHER, M.R. The objection taken by the defendant is, that the answers to the interrogatories in question cannot disclose anything which can be fairly said to be material to enable the plaintiff either to maintain his own case or to destroy the case of his adversary. It must be admitted that, if the answers could be material for either of these purposes, the interrogatories ought to be answered, but I think it must equally be admitted that, if the answers could not be material for either of these purposes, we ought not to order the defendant to answer. The question, therefore, is, whether the answers to the interrogatories objected to could, in our view, be material for either purpose.

Now it was suggested first that the object of the interrogatories was to obtain disclosure of the names of the persons who had made the statements in question to the defendant, and that if those names were disclosed the plaintiff might be able to shew that in making those statements those persons were actuated by malicious motives, and that, if so, the defendant in publishing what was stated to him by those persons must equally be held to have acted maliciously, so that, if he was entitled to any privilege, that malice would take away the privilege.

Now with regard to comments made by a writer, that privilege (in the sense in which the word is ordinarily used) is destroyed if the writer who makes the comment is actuated by malice, is, in my opinion, beyond the possibility of discussion. It has been so held in express terms by this Court, and I believe it has always been so held. And the reason is, that, in order to substantiate a claim to privilege, the defendant must shew not only that what he has done was done on a privileged occasion, but also that he has used his privilege rightly, for, if the privilege is abused for the purpose of personal vengeance, it has been frequently held that, although the occasion may be privileged, the defendant is not privileged, because in such a case he is not really using his right or privilege at all, but is gratifying his own malice. But to shew that the persons who informed the defendant were malicious does not carry the case any further. What must be shewn is, that the defendant was malicious, and to shew that his informants were malicious is not evidence that he was malicious. It is just as consistent with want of malice as with malice on his part. If, therefore, it is attempted to defend the interrogatories, and to insist upon answers to them on that ground, it is an immaterial ground, and for that reason the Court ought not to insist upon their being answered.

But it is said that there are other grounds upon which these interrogatories can be supported, and we must consider the matter with regard to the two grounds of defence—the one, that what has been published by way of comment is a fair comment upon a public matter; and the other, that what has been stated as a fact is a true account of what actually took place.

Now with regard to the question whether the comment was fair, how can it be said to depend upon the names of the persons who gave the information, or upon whether they were acting maliciously? I have already dealt with the question of malice. But how can the names of the informants be important or in any way effective upon the question whether the defendant's comments are fair? I cannot see how the knowledge of those names would aid in solving that question.

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As to the question whether the report of what took place in the Mauritius is a correct report, how can the names of the informants, or the existence or non-existence of the document in which their information was given, affect the matter? The defendant will have to prove that the account of the transaction which he has given in his newspaper is a true and accurate account of what took place. That cannot depend upon whether the information which he received was accurate; it must depend upon whether what he himself has published is in fact true and accurate. How can the names of his informants be of any importance for that purpose? Supposing their names were given, what effect could they have? They could have none. Supposing the document referred to were produced in Court, what effect could it possibly have upon the issue? None whatever. Supposing the document differed from the account actually published by the defendant, how would that shew that the account given by him is not accurate? The question is one of fact. In order to decide whether the account published by the defendant is true and accurate, one must compare, not what he has stated with the information he had, but what he has stated with what in fact took place in the Mauritius. If what the defendant has stated is true and accurate, it is wholly immaterial whether the information given to him at some intermediate stage was or was not accurate, or differed from that which he published. The only way in which it can be suggested that the production of the document, or any information as to where it is or what has been done with it, or the disclosure of the names of the persons who gave the information, could be of any use to the plaintiff would be for the purpose of enabling him to get at the persons named, or to look at the contents of a document so disclosed, with the view of finding out evidence that the statements of fact were not accurate, or that the motive of the writer was malicious. In other words, the plaintiff wishes to maintain his questions, and to insist upon answers to them, in order that he may find out something of which he knows nothing now, which might enable him to make a case of which he has no knowledge at present. If that is the effect of the interrogatories, it seems to me that they come within the description of "fishing" interrogatories, and on that ground cannot be allowed.

The moment it appears that questions are asked and answers insisted upon in order to enable the party to see if he can find a case, either of complaint or defence, of which at present he knows nothing, and which will be a different case from that which he now makes, the rule against "fishing" interrogatories applies. I think all these interrogatories, including the eighth, are open to this objection, and therefore the Court ought not to order them to be answered.

LINDLEY, L.J. As regards the first seven interrogatories I take the same view as that expressed by the Master of the Rolls.

I have some doubt about the eighth interrogatory, and I wish to express it, but before doing so I will make a few general observations about interrogatories. The type of cases to which the rules of equity relating to discovery and interrogatories applied were those in which a cestui que trust, or a legatee, or a creditor, sought information from a trustee or an executor, all the information being in the possession of the defendant and the plaintiff being

entirely ignorant about it. The doctrines laid down in cases of that type have been extended to other cases, but equity lawyers have never had to consider the limits and qualifications subject to which those doctrines ought to be applied to such cases as actions for libel. I think we ought to be extremely careful in extending those equitable doctrines to a totally new class of case in which entirely different considerations arise.

Now as regards the eighth interrogatory, I have some doubt whether it is not sufficiently material to entitle the plaintiff to have an answer to it. My doubt arises in this way: the defendant has made the ordinary affidavit as to documents in his possession, and he has omitted from it the manuscript which he received from the correspondent in the Mauritius from which the statements are derived the publication of which is complained of. He has done that upon the theory that the manuscript does not relate to the matters in question in the action. Now, one of the matters in question is, whether that which was published was a substantially true report of what took place in the Colony, and, looking at the matter from a purely theoretical point of view, I am inclined to think that, if the defendant had fifty reports of what took place there, every one of them would be material to the plaintiff as tending to enable him to disprove the fairness and truthfulness of the publication of which he complains. I should say primâ facie that would be so, and that the plaintiff would be entitled to have from the defendant an answer to the question whether he had in his possession any particular report which the plaintiff might specify of the proceedings in question. But, bearing in mind what I have said about extending equitable principles to an action of this nature, I am not prepared to carry out those principles logically. Actions of this kind have been familiar in Common Law Courts for many years, and those Courts have had to grapple with these difficulties. Equity lawyers have not had to do so, and the judges of the Queen's Bench Division have arrived, as I understand, at a tolerably settled practice never to order production of such documents as this for reasons which I appreciate, although perhaps I should not have given effect to them in the first instance. Although, therefore, I have some doubt whether, looking at it as a pure question of principle, the plaintiff is not entitled to a further answer to the eighth interrogatory, I do not dissent from the view of my learned brethren that there are considerations on the other side which are entitled to greater weight. This is the only point upon which I have felt any difficulty at all in the case, and I agree that the appeal must be dismissed.

LOPES, L.J. I can add nothing to the judgment of the Master of the Rolls, with every word of which I concur.

There is only one observation which I desire to make, and it is this, if the plaintiff wants to know the name of the correspondent in the Mauritius, or to see the original manuscript merely for the purpose of obtaining information in order that he may see if he has a case of which he has at present no knowledge or only a very partial knowledge, I am clearly of opinion that on that ground the interrogatories ought not to be allowed.

Appeal dismissed.

Solicitors for plaintiff: *C. & S. Harrison & Co.*

Solicitors for defendant: *Soames, Edwards, & Jones.*

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Asquith, (*Sir Charles Russell, Q.C.*, with him) for the plaintiff. As to the first two interrogatories, it is material to the plaintiff's case to ascertain approximately the extent of the circulation of the publications in respect of which he is suing. He does not ask for an exact statement of the number of copies.

As to the others, they go to the question of damages, which is always a material question in actions for libel. It is part of the plaintiff's case that the publication was reckless, and if he shews this it will tend to increase the damages, for the jury are entitled to take the defendants' conduct into consideration: *Smith* v. *Harrison* (1); *Praed* v. *Graham*. (2)

Lumley Smith, Q.C., in reply. The questions asked are not relevant to anything that is in issue: *Robertson* v. *Wylde*. (3)

The plaintiff is not entitled to interrogate as to that which is merely evidence of a material fact, but is not the fact itself.

DENMAN, J. Our decision must be partly in accordance with the view taken by the master, and partly contrary to that view. The action is brought to recover damages for a libel, in which the plaintiff is accused of conduct which, if the allegations were true, would be most discreditable. The defendants do not justify, nor do they deny the publication, or plead privilege, or deny that the statements complained of are libellous. The only defence which they set up is that they pay 40*s.* into Court, which they say is enough to satisfy the plaintiff's claim, and by adopting this course they admit that they are liable, and leave it to the jury to assess the damages. The only issue to be tried is as to the amount of damages to which the plaintiff is entitled.

The first and second interrogatories ask for information as to how many papers and how many copies of the pamphlet have been issued and circulated. The objections taken are that to answer these interrogatories would involve the disclosure of the business transactions of the defendants, and that the defendants are not in a position to be able to give the information required. As to the first of these objections, I am of opinion that the defendants are not entitled to say that they will wholly abstain from

(1) 1 F. & F. 565. (2) 24 Q. B. D. 53.
(3) 2 M. & R. 101.

obtaining the information required, because it is inconvenient to do so, and because transactions would be disclosed which relate to their private business. The defendants on this point relied on the case of *Moore* v. *Craven* (1); but that case is distinguishable from the present, for in an action for libel it is obvious that the extent of the circulation is important, and therefore the defendants should give some information as to this question. Next it is urged that it would be difficult to ascertain the amount of the circulation, and that to do so would involve a complicated investigation and great expense. But the plaintiff does not require a statement as to the exact amount of the circulation of the paper, but only wants some statement which will enable him to establish that the circulation is extensive. The defendants must give the best information they can in round numbers. That I think is all the master intended, and so far his order must be upheld. The second interrogatory is as to the circulation of the pamphlet, and as to this the same considerations are applicable.

As to the other interrogatories, numbers three to ten inclusive, a question of more difficulty arises. I am not perfectly confident that if the point had come before me at chambers in the first instance, I might not have been inclined to order an answer to be given. In an action for libel the damages are not confined to the injury inflicted on the plaintiff, but may to a certain extent be measured by the conduct of the defendant, and it seems at first sight not unreasonable to say that it may be material to inquire from whom the defendant got his information, and what inquiries he made as to its accuracy. If, however, I thought it was the law that such information could be demanded, still I should not approve of the interrogatories sought to be administered in the present case, for they amount to cross-examination of the defendants as hostile witnesses. But without relying on the form of the interrogatories, I think we are bound by authority to refuse to require an answer, on the ground that in the decisions which have been referred to it has been held in fact and in substance that such interrogatories as these are not admissible in an action for libel. Mr. Asquith contends that these cases do not apply, because in them the issues were different from that raised

(1) Law Rep. 7 Ch. 94, note.

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in the present case, but it is impossible to look at all the decisions without seeing that the Courts thought that it was not competent to the plaintiff in an action for libel to administer interrogatories asking the defendant from whom he got his information; if we were to hold otherwise we should be overruling these decisions. The question of damages is in every action for libel one of the main questions to be considered. On the ground, therefore, that in all those cases the question of damages was included, the decision at which I have arrived is that in an action for libel, where money is paid into Court, the plaintiff cannot ask the defendant by interrogatories from whom his information was obtained. Order XXXI., r. 1, contains a proviso "that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness." No doubt in one sense a question as to whether the person who had supplied information to a defendant in an action for libel was not a person of such notoriously bad character that no reasonable person ought to have acted on any statement made by him, might be relevant with regard to the question of damages. But Order XXXI., r. 1, was not intended to extend the principle on which discovery depends, and it is not admissible to ask such a question as an interrogatory, although no doubt the question could be asked on cross-examination. This is probably the very kind of case which may have been present to the minds of the framers of the rules when they inserted this proviso.

For these reasons I am of opinion that the order of the master goes too far, and that we must overrule it except so far as relates to the first and second interrogatories.

WILLS, J. I am of the same opinion. As to the first and second interrogatories, I think the defendants are bound to give a further answer, and there can be no difficulty in answering as to what, roughly speaking, is the extent of the circulation of the newspaper and the pamphlet. Nothing is easier than to raise objections of the class of those taken by the defendants. As applied to a reasonable method of answering, few objections that could be taken are more devoid of foundation. A rough

answer is all that is asked for, and we must assume that the plaintiff's advisers will be reasonable, and will take a reasonable answer; if they do not do so, they will gain nothing by any motion to require a further answer.

The other question is covered by authority, for we cannot suppose that all the Courts before whom the point has come have overlooked the fact that the question of damages is always in issue in an action for libel. Logically there can be no claim to support such interrogatories, for, logically speaking, the question is not how badly the defendant has behaved, but what damage the plaintiff has suffered. The two questions have but a slight and accidental bearing upon one another; very often the worse the conduct of the defendant the less the actual damage, whether in money or reputation, to the plaintiff. It is true that it is now established that the conduct of the defendant can in no ordinary case be excluded from consideration. This doctrine, however, is more of a concession to the intellectual frailty of human nature, and to the practical impossibility of escaping from its introduction, than a recognition of any necessary connection between the two subjects, and is introduced rather by way of concession to the impossibility of excluding it. During the time which has elapsed since interrogatories were introduced by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 51), there is no precedent to be found for such interrogatories as these, as is pointed out by Lord Coleridge, C.J., in *Gibson* v. *Evans*. (1) My own experience as a junior was not inconsiderable, and in my recollection such interrogatories have never been allowed. For these reasons I am of opinion that, as to the second set of interrogatories, numbers three to ten inclusive, no order ought to be made for a further answer.

Order varied.

Solicitors for plaintiff: *Lewis & Lewis.*

Solicitors for defendants: *Soames, Edwards, & Jones.*

(1) 23 Q. B. D. 384.

P. B. H.

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Feb. 20.

NEWMAN *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Practice—Discovery—Interrogatories—Security for Costs—Deposit—Discretion of Judge—Order XXXI., *rr.* 25, 26.

A judge or master has, under Order xxxi., r. 25, a discretion to dispense with the deposit for security for the costs of discovery, prescribed by rules 25, 26 of the Order.

Appeal from chambers.

The action was brought under Lord Campbell's Act to recover damages for a fatal accident to the plaintiff's husband, owing to the alleged negligence of the defendants' servants. After delivery of defence, the plaintiff obtained leave from a master to deliver interrogatories to the defendants without giving security for costs under Order xxxi., rr. 25, 26. (1) Day, J., upon appeal, reversed the master's order. The plaintiff appealed.

C. Gregson Ellis, for the plaintiff. The object of Order xxxi., r. 26, is to provide for the mode in which security is to be given in cases where it is not dispensed with, and the operation of that rule is qualified and controlled by rule 25. The words "unless otherwise ordered by the Court or a judge" give a discretionary power to dispense with the deposit in suitable cases; if they do not, it is difficult to give any meaning to them. In *Aste* v. *Stumore* (2), where the question arose, although it was not neces-

(1) By Order xxxi., r. 25: "In every cause or matter, the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the Court or a judge, be secured in the first instance as provided by rule 26 of this order, by the party seeking such discovery . . ."

By rule 26: "Any party seeking discovery by interrogatories shall, before delivery of interrogatories, pay into Court to a separate account in the action . . . to abide further order, the sum of 5*l.*, and if the number of folios exceeds five the further sum of 10*s.* for every additional folio . . . The party seeking discovery shall with his interrogatories . . . serve a copy of the receipt for the said payment into Court, and the time for answering or making discovery shall in all cases commence from the date of such service. The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment has been made."

(2) 13 Q. B. D. 326.

sary to decide it, both Brett, M.R., and Bowen, L.J., expressed a very strong opinion that such a discretion did exist. It is true that in *Boarder* v. *Lindsay* (1) a Divisional Court held that there was no discretion to dispense with the deposit, but that decision is directly opposed to the strongly expressed opinion of the Court of Appeal in *Aste* v. *Stumore* (2) and ought not to be followed.

E. R. Turton, for the defendants. The case is concluded by the decision in *Boarder* v *Lindsay*. (1) In *Aste* v. *Stumore* (2) the Divisional Court decided that rule 26 was imperative, and that there was no discretion in the Court or a judge to dispense with the deposit there required; the Court of Appeal has not overruled that decision, and it is therefore binding, as was pointed out by the Divisional Court in *Boarder* v. *Lindsay*. (1)

DENMAN, J. I think that this appeal must be allowed. It is perfectly clear that in *Aste* v. *Stumore* (2) the Court of Appeal did not agree with the decision of the Divisional Court that there was no discretion in any case to dispense with the deposit, although it was unnecessary for the purposes of that case for the Court of Appeal to decide the point. We find, therefore, two judges in the Court of Appeal expressing their dissent from a decision of a Divisional Court, although not in terms overruling it; and under those circumstances I think this Court is left at large to give its own interpretation to these rules. It seems to me clear on principle that there must be a discretion to dispense with the deposit; if it were not so, the words "unless otherwise ordered by the Court or a judge" would be meaningless. It is quite possible to construe these two rules together so as to allow of the existence of the discretion, and at the same time to make them consistent with each other, by interpreting rule 26 as applying to the mode in which security is to be given, unless it has been dispensed with under rule 25; otherwise I do not see how any sensible construction can be placed upon the language of rule 25. I think, therefore, that we are not, under the peculiar circumstances, bound by the decision in *Boarder* v. *Lindsay* (1),

(1) 34 W. R. 473. (2) 13 Q. B. D. 326.

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and that the master had a discretion, which he rightly exercised in the present case, to dispense with the deposit.

VAUGHAN WILLIAMS, J. I am of the same opinion.

Appeal allowed.

Solicitor for plaintiff: *Robert Jenkins, for Ewart Jukes, Staines.*
Solicitors for defendants: *Bircham & Co.*

W. J. B.

Feb. 8.

[BEFORE THE RAILWAY AND CANAL COMMISSION.]

THE WINSFORD LOCAL BOARD *v.* THE CHESHIRE LINES COMMITTEE.

Railway and Canal Commission—Jurisdiction—Power to require a Railway Company to resume Passenger Traffic on a part of its line on which Passenger Traffic has been discontinued—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2, 3—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *ss.* 1, 8.

The Court has jurisdiction under ss. 1, 2, 3 of the Railway and Canal Traffic Act, 1854, to require a railway company to resume passenger traffic on a part of its line on which passenger traffic has been discontinued.

South Eastern Ry. Co. v. *Railway Commissioners and the Corporation of Hastings* (5 Q. B. D. 217; 6 Q. B. D. 586), and *Dickson* v. *Great Northern Ry. Co.* (18 Q. B. D. 176) considered.

APPLICATION by the Local Board of the district of Winsford, Cheshire, for an order requiring the Cheshire Lines Committee to resume passenger traffic on the part of their lines between Cuddington and Over, the latter of which stations was within the district of the applicants, pursuant to ss. 1, 2, 3 of the Railway and Canal Traffic Act, 1854. The application stated that this part of the defendants' lines had been for some time used for both passenger and goods traffic, but that from November 30, 1888, passenger traffic had been discontinued upon it.

The defendants took the preliminary objection that the Court had no jurisdiction to make the order applied for.

Littler, Q.C., and *C. A. Russell*, for the defendants, in support of the preliminary objection. The Court has no jurisdiction to

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make the order. The plaintiffs rely on s. 2 of the Railway and Canal Traffic Act, 1854, which imposes on railway companies the obligation "according to their respective powers to afford all reasonable facilities for the receiving and forwarding and delivering of traffic," and by s. 1 this term is to include "passengers and their luggage." The effect of this clause is discussed by Cockburn, C.J., in his judgment in *South Eastern Ry. Co.* v. *Railway Commissioners and the Corporation of Hastings.* (1) That was a demurrer by the railway commissioners to a declaration in prohibition by the railway company alleging that they had exceeded their jurisdiction in granting an order requiring the company to enlarge and improve its station at Hastings. Cockburn, C.J., had no doubt that the order was in excess of the jurisdiction. He thought it inconceivable that the legislature could have intended by words so "uncertain and indefinite" to sanction this interference with the company in the management of its own affairs. The Court granted the prohibition. On appeal the demurrer was allowed (2), the Court of Appeal holding that there was jurisdiction to make parts of the order. But Lord Selborne, L.C., and Brett, L.J., expressly say in their judgments that the jurisdiction must be regarded as limited in the strictest way to cases which fall within the exact letter of the clause, and they illustrate this by pointing out that the commissioners could not without exceeding their jurisdiction require a railway company to build a new station. If an order to build a new station would be in excess of the jurisdiction, the same must surely be true of an order requiring a railway company to resume passenger traffic on a section of its line on which the company has for its own reasons discontinued it.

The case of *Dickson* v. *Great Northern Ry. Co.* (3) in the Court of Appeal may be cited by the applicants. But Brett, M.R., who was a party to the decision, was a member of the Court which decided *South Eastern Ry. Co.* v. *Railway Commissioners and the Corporation of Hastings* (1), and he took no exception to the statement made by Lord Selborne, L.C.: "A company may carry or not upon its own line as it thinks fit; and if it does so, may

(1) 5 Q. B. D. 217, at p. 227. (2) 6 Q. B. D. 586.
(3) 18 Q. B. D. 176.

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undertake that business under various conditions and limitations." Had the legislature intended that railway companies should no longer retain this discretion, there would be some express provision to that effect in the Railway and Canal Traffic Act, 1888.

[They also referred to *Attorney-General* v. *Great Western Ry. Co.* (1), and to the judgments of Wood, V.C., in *Lancaster and Carlisle Ry. Co.* v. *London and North Western Ry. Co.* (2), and *Hare* v. *London and North Western Ry. Co.* (3)]

Balfour Brown, Q.C., and *Darlington*, for the applicants, were not heard.

WILLS, J. I have come to the conclusion that the Court has jurisdiction to entertain this application. I have followed with the closest attention every part of the careful and elaborate argument which has been addressed to us by the learned counsel for the defendant company, and I do not doubt that they have laid before us every consideration which could at all influence our minds in forming an opinion. We have, as it seems to me, to consider in the first place the language of the statute; in the second place the effect of the decisions.

The material words of s. 2 of the Railway and Canal Traffic Act, 1854, are, "every railway company, canal company, and railway and canal company shall according to their respective powers afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively." By the interpretation clause the word "traffic" is to include "passengers and their luggage." If there had been no decision upon these words of s. 2, I scarcely think that the question need have presented any great difficulty. Taken by themselves, they could scarcely be read otherwise than as imposing on a railway company the obligation of affording, according to its powers, all reasonable facilities for dealing with—an expression which I use as an abbreviation of the longer phraseology of the Act—passenger traffic over the whole extent of its system. I

(1) 4 Ch. D. 735. (2) 2 K. & J. 293.
(3) 30 L. J. (Ch.) 817.

see nothing to limit its application to selected parts of the system.

But it is necessary to consider with great care what limitations, if any, have been imposed upon the meaning of this clause by decisions. In my own case this precaution is especially necessary, for I must own that primâ facie I was inclined to accede to the view which was put forward with so much ability by the defendants' counsel. It is, I think, essential to bear in mind that, prior to the passing of the Railway and Canal Traffic Act, 1854, the theory had always been that a railway was in the nature of a highway which the public had a right to use on payment of tolls, and that a railway company had an absolute discretion as to whether they would or would not become carriers, and as to what, if they became carriers, they would carry. This is the ground of the decisions of Wood, V.C., which have been cited, and much of the earlier law on the subject is founded upon the same conception. If this state of things still existed, I have little doubt that the defendants would be right in their contention.

But there is the authority of the Court of Appeal for holding on the other hand that the Act of 1854 made a most material difference in the legal position of railway companies. Notwithstanding all the criticism which has been expended upon *Dickson* v. *Great Northern Ry. Co.* (1), I cannot doubt that the Court of Appeal in that case meant to lay down the broad proposition which I propose to apply in this case. The view which, as I understand, was there taken of the position of a railway company before and after the Act, was that before the Act a railway company not being a common carrier, and therefore not being a common carrier of dogs, was not bound to carry those animals at all, and therefore, if it did carry them, could do so upon any terms it chose to lay down; but that since the passing of the Act a railway company, at all events if it undertook the carriage of these animals, came under the 2nd section, and could only do this subject to the obligation to afford "reasonable facilities" for this kind of traffic over the whole extent of its system. I purposely limit my observation to the case in which the carriage of

(1) 18 Q. B. D. 176.

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the particular class of traffic has been undertaken. The path of decision in matters of railway traffic is so thorny, and the consequences of unnecessary deviation may be so far-reaching, that I think it more than usually desirable not to take one step outside the path that must be trodden in the particular case under consideration. But it is clear to my mind that if in that case the question before the Court of Appeal had related not to animal but to passenger traffic, and it had appeared that the company carried passengers, the decision would have been that it was bound under the 2nd section to afford "reasonable facilities" for passenger traffic, and that over the whole extent of its system.

This is, in my opinion, the plain effect of the judgments in *Dickson* v. *Great Northern Ry. Co.* (1) It has, however, been suggested that, though this may be their plain effect, it cannot be their true meaning, because the present Master of the Rolls, who was one of the judges who decided the case, was with Lord Selborne a member of the Court which decided *South-Eastern Ry. Co.* v. *Railway Commissioners and the Corporation of Hastings* (2), and Lord Selborne in his judgment in that case had spoken of the position of railway companies under the section in a manner alleged in argument to be impossible to reconcile with the judgments in *Dickson* v. *Great Northern Ry. Co.* (1) if they have the effect which I have attributed to them. If I thought this, I should undoubtedly pause and take time to consider whether the two cases can or cannot be reconciled. But I cannot see a trace of any conflict between either the decisions or the observations made in the two cases. The short passage alluded to in Lord Selborne's judgment in the earlier case is to the following effect: "A company may carry or not upon its own line as it thinks fit, and, if it does so, may undertake that business under various conditions and limitations. But if and so far as it does undertake so to carry either passenger or goods traffic, it comes, in my opinion, under the obligation to afford for that traffic the facilities required by the 2nd section of the Act." There is in my opinion nothing either in this language or in the rest of Lord Selborne's judgment which in any way indicates that he

(1) 18 Q. B. D. 176. (2) 6 Q. B. D. 586.

meant that a railway company can now undertake to carry passengers on any one part of its line without becoming bound to carry them on its whole line. His plain meaning appears to me to be that if a railway company undertakes to carry passengers at all upon its line, it comes under the obligation to provide "reasonable facilities" for dealing with passenger traffic over its whole line. Certainly it would be a startling proposition that, consistently with the law of the land, the London and North-Western Railway Company could discontinue passenger traffic between London and Birmingham, or that a railway company which carries passengers to Manchester, could stop all its passenger trains two miles outside Manchester, in order to damage the traffic of another company. Mr. Russell did not attempt to shirk the conclusion—inevitable, as it seems to me, if his argument be sound—that such things might be done, and would be subject to no review.

The argument ab inconvenienti admits, I think, of the short but sufficient answer that credit must be given to the Court for a desire—and for the intellectual competence—to make reasonable orders. If we are satisfied upon the hearing that the order which has been applied for would be unreasonable, we shall not make it. I find no difficulty in imagining a case in which no Court would say that it was reasonable to compel a railway company to do that which is asked for by the present application. I am, however, clearly of opinion that under s. 2 of the Railway and Canal Traffic Act, 1854, it is no longer competent for a railway company which has undertaken a particular description of traffic to deny the jurisdiction of the Court to take into consideration the legality of its conduct in respect of that kind of traffic upon some particular branch of its line. Our judgment must, therefore, be in favour of the applicants.

SIR F. PEEL. I am of the same opinion. If the Court has not jurisdiction under the 2nd section of the Railway and Canal Traffic Act, 1854, to entertain this application, the result will be that any railway company will be able to make this section practically a nullity. It will be competent to the railway company to afford limited facilities for a particular traffic for a time, and

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Sir Frederick Peel.

then, when the section is appealed to, to decline to give any facilities at all, by discontinuing the traffic altogether. In such a case the Court would have no jurisdiction to compel the company to resume the discontinued traffic under its special Act or the Railways Clauses Consolidation Act, which would be incorporated with it.

It has never been doubted that s. 7 of the Railway and Canal Traffic Act, 1854, took away the power which railway companies previously had of limiting their liability for negligence by general or special conditions. I think it equally clear that the effect of s. 2 is to deprive railway companies which have commenced a particular traffic of the power which they previously had of continuing or discontinuing it at their own discretion on this or that branch of their lines. The case of *Dickson* v. *Great Northern Ry. Co.* (1) is, in my opinion, conclusive in favour of the applicants.

Mr. Commissioner PRICE concurred.

Solicitors for the applicants: *Busk & Co., for John C. Coote, Winsford.*

Solicitors for the defendants: *Cunliffes & Davenport, for Lingards, Manchester.*

(1) 18 Q. B. D. 176.

H. D. W.

[IN THE COURT OF APPEAL.]

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Feb. 18.

ROCKE *v.* McKERROW.

Practice—Appeal—Trial with Jury—Judgment entered against Finding of Jury—Jurisdiction of Court of Appeal—Order XXXIX., *r.* 1; *Order* XL., *rr.* 4, 5.

At a trial before a judge and jury the jury found a verdict for the plaintiff upon the claim, and for the defendant upon the counter-claim; upon further consideration the judge thought that there was no evidence which he ought to have left to the jury in support of the plaintiff's claim, and gave judgment for the defendant both upon the claim and counter-claim. The plaintiff having appealed to the Court of Appeal:—

Held, that the appeal would not lie, and that the plaintiff's remedy was by motion in the Divisional Court under Order XXXIX., r. 1.

APPEAL from a judgment of Stephen, J.

The plaintiff claimed damages for breach of a covenant for quiet enjoyment, and the defendant counter-claimed a sum of 8*l.* 3*s.* 6*d.* for rent. At the trial before Stephen, J., and a special jury at Manchester, the jury found a verdict for the plaintiff for 80*l.* on the claim, and for the defendant for 8*l.* 3*s.* 6*d.* on the counter-claim. After argument upon further consideration the learned judge, thinking that there was no evidence which he ought to have left to the jury in support of the plaintiff's claim, gave judgment for the defendant both on the claim and counter-claim. The plaintiff appealed.

Gully, Q.C. (*Hopkinson* and *Sillem*, with him), for the defendant. There is a preliminary objection to the hearing of this appeal. Under Order XXXIX., r. 1, where there has been a trial with a jury, a motion for a new trial or to set aside a verdict, finding or judgment, is to be made to a Divisional Court; the plaintiff cannot, therefore, proceed directly to the Court of Appeal.

Ambrose, Q.C. (*W. S. Robson* and *Compton Smith*, with him), for the plaintiff. The provisions of Order XXXIX., r. 1, must be read subject to Order XL., rr. 4, 5, which provide that where, at or after a trial by a judge, either with or without a jury, the judge has directed that any judgment be entered, an application to set

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aside the judgment on the ground that it is wrong is to be made to the Court of Appeal. These rules are directly in point in the present case and the appeal is properly brought.

Gully, Q.C., in reply. The provisions of Order XL., rr. 4, 5, only apply to cases where, upon findings admitted to be correct, it is contended that as a matter of law judgment has been wrongly entered; they have no application to the present case, where the finding, or rather the hypothesis upon which the finding is arrived at, is not accepted, and the finding is simply set aside.

[The following cases were cited during the arguments: *Etty* v. *Wilson* (1); *Davies* v. *Felix* (2); *Yetts* v. *Foster*. (3)]

LORD COLERIDGE, C.J. We are all of opinion that this appeal has been brought to the wrong Court, and that it cannot be heard. But, as it would work injustice if we were simply to dismiss it, we will enlarge the time for moving the Divisional Court.

LORD ESHER, M.R. I have come to the same conclusion. I cannot resist the argument on behalf of the defendant, that supposing the construction of the rules contended for by the plaintiff is right, an absurd result will follow, which may be put in the following way. Supposing the judge at the trial to be of opinion that he ought to direct a verdict for the defendant on the ground that there is no evidence to support the plaintiff's case, and he so directs the jury, and his direction is questioned, then that is only ground for a new trial, and the appellant must go to the Divisional Court; that is clear. Supposing again that he does leave a question to the jury, but changes his mind before they have answered it, and then tells the jury not to consider the question, and directs them to find a verdict for the defendant; that will be the same thing; it is misdirection, and the appellant must go to the Divisional Court. But suppose, as in the present case, he leaves the question to the jury, and after they have answered it in favour of the plaintiff he takes time to consider whether he was right or wrong in leaving it to them, and subse-

(1) 3 Ex. D. 359. (2) 4 Ex. D. 32.

(3) 3 C. P. D. 437.

quently comes to the conclusion that he was wrong, and enters judgment for the defendant; what is the effect of his doing so? Does he enter judgment on the assumption that the findings of the jury are correct, or is he not rather, if I may use the phrase, repenting of having left the question to the jury at all, and does not his action amount to a setting aside of the question and answer, and to a directing of a judgment in favour of the defendant in the same way and to the same effect as if he had so dealt with the matter at the trial? I think the latter must be the correct view, and that the judge does not assume the verdict to be correct, but sets aside the questions and answers, and that therefore the proper mode of appeal from his decision is by application to the Divisional Court.

FRY, L.J. I am of the same opinion. The case falls, I think, under Order XXXIX., r. 1, and not within Order XL., r. 4. The latter rule is applicable to cases where the findings are admitted to be correct, and the application is made on the ground that judgment upon those findings has been wrongly entered; in other words, where the findings stand, but it is suggested that the wrong inference has been drawn from them.

Appeal dismissed.

Solicitors for plaintiff: *Pritchard & Englefield, for Roger A. Gartside, Manchester.*

Solicitors for defendant: *Bower, Cotton & Co., for J. H. Boardman, Manchester.*

W. J. B.

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Jan. 18.

IN RE McGRATH. EX PARTE THE OFFICIAL RECEIVER.

Bankruptcy—Practice—Order appointing Time and Place for Bankrupt's Public Examination—Service by Post—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 25, 142—*Bankruptcy Rules*, 1886, *rr.* 92, 185, 186.

Under rule 186 of the Bankruptcy Rules, 1886, which directs that when any order is made appointing the time and place for holding the public examination of a debtor the official receiver "shall serve a copy thereof on the debtor," the copy of such order need not be served personally on the debtor, but may be sent by a prepaid registered letter to the debtor's last known address, according to s. 142 of the Bankruptcy Act, 1883, and rule 92 of the Bankruptcy Rules, 1886.

THIS was an application under s. 25 of the Bankruptcy Act, 1883, for a warrant to arrest J. McGrath, a bankrupt, under these circumstances.

On October 23, 1889, a receiving order was made against the bankrupt on a creditor's petition, and a copy of the order was duly sent to the bankrupt by registered post addressed to him at 78, High Holborn. On October 28 the bankrupt attended on the official receiver, and stated that he resided at 78, High Holborn.

On December 3 a notice of the time and place appointed by the Court for the public examination of the bankrupt was sent by the official receiver by registered letter to the bankrupt addressed to him at 78, High Holborn.

The notice was not returned. The bankrupt did not attend at the time and place appointed for his public examination, nor was any reason alleged for his absence. Thereupon the official receiver applied to the registrar for a warrant for the bankrupt's arrest, but the registrar, feeling a doubt whether the notice ought not to have been served upon the bankrupt personally, referred the matter to the judge.

Mr. Spyer (solicitor), for the application. The question is, what is intended by rule 186 of the Bankruptcy Rules, 1886, in directing service of an order made under s. 25 of the Act; neither the rule nor the section says anything about *personal* service, and it would seem that whenever *personal* service is intended the

rules expressly provide for it: rules 33, 62, 86, 153, 276. As no special mode of service is directed, s. 142 and rule 92 apply, and the service made by sending a prepaid registered letter is sufficient. The onus is on the bankrupt to shew good cause why the warrant should not issue.

CAVE, J. I think the service of the notice was sufficient. The 186th rule requires that, where any order is made appointing the time and place for holding the public examination of a debtor, the official receiver shall serve a copy thereof on the debtor. It does not say that the order must be personally served, but that it must be served on the debtor. Then s. 142 of the Act provides that all notices and other documents—which words include the copy of an order such as this—for the service of which no special mode is directed may be served by pre-paid post letter to the last known address of the person to be served therewith. Now, undoubtedly, the debtor is the person to be served; and no special mode of service is directed. One way of testing the point is to add to rule 186 the words of s. 142; and reading the two provisions together there is nothing inconsistent in their language. But, if the rule and section so read had said that the official receiver should serve the debtor personally by sending a copy of the order by pre-paid post letter to the last known address of the debtor, that obviously would have been a contradiction in terms. For these reasons I am of opinion that the document to be served under rule 186 may be sent by a pre-paid post letter; and as this has has been done in this case in the manner pointed out by rule 92, viz., by a registered letter, the warrant for the arrest of the debtor may be issued.

Solicitors: *Spyer & Co.*

H. L. F.

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Jan. 20, 21, 22.

[IN THE COURT OF APPEAL.]

DUKE OF DEVONSHIRE AND OTHERS *v.* O'CONNOR.

Inclosure Act—Game—Reservation of Exclusive Right of Shooting to Lord of Manor—Construction.

By a private Inclosure Act an allotment was directed of certain waste lands, the mines, &c., under the allotments being reserved to the lord; the allotments were declared to be the freehold of the allottees to all intents and purposes whatsoever. The reservation clause provided that nothing in the Act contained should prejudice the right, title, or interest of the lord of the manor, his heirs and assigns, of, in, or to the coal, &c., under the allotments, or of, in, or to the seigniories and royalties, franchises, and liberties, incident and belonging to the manor; but that he might have, hold, take, and enjoy "all rents, services, courts, &c., piscaries, fishing, hunting, hawking and fowling, &c., and all other royalties, liberties, franchises, privileges, pre-eminences, jurisdictions, and appurtenances whatsoever to the said barony and manors or to the lord or lady thereof for the time being incident, appertaining or belonging, or which have been anciently used, exercised, and enjoyed by the lord or lady of the same barony or manors (other than and except such right of common, pasturage, and free warren in respect of conies, which is intended to be extinguished) as could or might be claimed by him, her, or them as owner of the soil of the said moors, commons, and waste grounds, in as full, ample, and beneficial manner as he could or might have held and enjoyed the same in case this Act had not been made." The clause then dealt with the reservation of minerals and gave all necessary wayleaves and powers of search and working to the lord. It did not appear whether before the Act there was a general right of free warren in the lord:—

Held, that the Act did not confer on or reserve to the lord an exclusive right of shooting game over the allotments.

A right of shooting game over allotments declared by an Inclosure Act to be the freehold of the allottees can only be reserved to the lord in express terms or by necessary implication.

Sowerby v. *Smith* (Law Rep. 9 C. P. 524), approved and followed.

Lord Leconfield v. *Dixon* (Law Rep. 3 Ex. 30), commented on.

APPEAL of the defendant from the judgment of Grantham, J., at the trial without a jury.

Action for disturbing the plaintiffs' exclusive right of shooting game over certain land. The defendant denied the right, and claimed to be possessed of the right of shooting game as being owner in fee and in possession of the land.

The plaintiffs were the trustees of the Earl of Carlisle, the lord

of the manor of Nether Denton in the county of Cumberland, and were the successors in title of Frederick, Earl of Carlisle, who was lord of the manor at the date of the Inclosure Act referred to below; the defendant was the rector of Nether Denton, and the present owner in fee as rector of an allotment made under that Act. The plaintiffs claimed that the right of shooting over the defendant's land had been reserved under the Inclosure Act to the lord of the manor. There were no facts in dispute. It did not appear whether before the Act there was a general right of free warren in the lord of the manor.

The Inclosure Act (38 Geo. 3, c. 18, of the private Acts), was passed in the year 1798, and applied to the manor of Upper Denton and Nether Denton in the barony of Gilsland in the county of Cumberland.

By s. 17 (1) (p. 14 of the private Act), the commissioners were directed to allot to the earl, or the lord or lady of the manors for the time being, a certain proportion of the residue of the wastes, "in lieu of and as a full compensation for the right and interest of the said Frederick, Earl of Carlisle, as lord of the said barony of Gilsland, and manors of Upper Denton and Nether Denton, and of the lord or lords, lady or ladies of the said barony and manors for the time being, in and to the soil of the residue of the said moors, commons, and waste grounds (except as hereinafter is mentioned), and as a recompense for the consent of the said Frederick, Earl of Carlisle, to the division and inclosure of the said moors, commons, and waste grounds, as lord of the said barony and manors."

Sect. 18 (p. 15), provided for an allotment to the rector of Nether Denton and his successors for tithes, and s. 19 (p. 15), for the allotment in severalty of the residue of the waste lands to the earl and the persons entitled to right of common upon the waste.

Sect. 20 (p. 16), contained a proviso that the coal mines, minerals, and metals lying under any of the allotments to be made in pursuance of the Act were not to be taken into the valuation of such allotments, "it being intended that all coal

(1) The sections are numbered for the purposes of this report; they are not numbered in the Act as printed.

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mines, minerals, and metals within or under the whole of the said moors, commons, and waste grounds, shall be reserved to the said Frederick, Earl of Carlisle, and the lord or lords, lady or ladies of the said barony and manors for the time being, in the manner hereinafter mentioned."

By s. 24 (p. 19), it was provided that the allotments and appropriations should be freehold "to all intents and purposes whatsoever."

By s. 28 (p. 21), all rights of common upon the whole land were to cease upon allotment.

Sect. 38 (p. 26), provided that "nothing in this Act contained shall be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of the said Frederick, Earl of Carlisle, his heirs or assigns, or of the lord or lords, lady or ladies of the said barony and manors for the time being of, in, and to the coal, lead, tin, copper, stone, or slate, minerals or metals, within or under the said moors, commons, and waste grounds, intended to be inclosed as aforesaid (save and except the stones in the public stone quarries, to be set out as aforesaid), or of, in, or to the seigniories and royalties, franchises and liberties, incident and belonging to the said manors; but that the said Frederick, Earl of Carlisle, and all and every person and persons claiming by, from, or under, or in trust for him as lord of the said barony and manors, and all succeeding lord and lords, lady and ladies, and owners thereof, for the time being, shall and may, at all times for ever hereafter, have, hold, take, and enjoy all rents, services, courts, perquisites and profits of courts and mills (except for the grinding and grist of malt), piscaries, fishing, hunting, hawking, and fowling, goods and chattels of felons and fugitives, felons of themselves, and put in exigent, deodands, waifs, estrays, forfeitures, escheats, and all other royalties, liberties, franchises, privileges, pre-eminences, jurisdictions, and appurtenances whatsoever to the said barony and manors, or to the lord or lords, lady or ladies thereof, for the time being, incident, appertaining, or belonging, or which have been anciently used, exercised, and enjoyed by the lord or lords, lady or ladies of the same barony and manors (other than and except such right of common, pasturage, and free warren in respect of conies, which is intended to be

extinguished) as could or might be claimed by him, her, or them, as owner or owners of the soil of the said moors, commons, and waste grounds, in as full, ample, and beneficial a manner, to all intents and purposes, as he, she, or they could or might have held and enjoyed the same in case this Act had not been made." The section then proceeded to deal with the reservation to the lords of the manors of all the mines, minerals, and quarries within or under the lands intended to be inclosed and allotted, and to give all necessary ways and wayleaves, and powers for searching, winning and working them.

Sect. 42 (p. 29), gave to the owners of allotments certain limited rights of getting lime and other stone on their allotments.

The cause was tried before Grantham, J., without a jury at the Cumberland Summer Assizes, 1889, when judgment was given for the plaintiffs, and an injunction granted restraining the defendant from continuing or repeating the infringement of the plaintiffs' rights, or in any way disturbing or interfering with such rights. The defendant appealed.

Gully, Q.C., and *Mattinson*, for the defendant. The reservation in the Act is only of manorial or seigniorial rights, and does not include a right of shooting over the lands to be inclosed, which is an incident of the ownership of the soil and not a manorial right. By the terms of the Act primâ facie the rector is the freeholder of the land allotted to him, with all its incidents. The onus of shewing that either expressly or by necessary implication there is a grant to the lord of the manor of an incorporeal right of shooting over the defendant's freehold lies on the plaintiffs. If the reservation clause is to be read with the brackets as they now stand, the second bracket coming after the words "intended to be extinguished," then the clause is senseless and unintelligible, and on that footing the plaintiffs must fail; but assuming, as may be contended, that the clause must be read as if the second bracket came after the words "moors, commons, and waste grounds," then the case is within the decision in *Sowerby* v. *Smith*. (1) The cases of *Ewart* v. *Graham* (2), and *Lord Leconfield* v. *Dixon* (3),

(1) Law Rep. 9 C. P. 524. (2) 7 H. L. C. 331. (3) Law Rep. 3 Ex. 30.

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are distinguishable, because in those cases the words did not indicate that the reservation was confined to manorial rights.

[They also cited *Greathead* v. *Morley* (1), and *Bruce* v. *Hellivell.* (2)]

Bigham, Q.C., and *Edward Pollock*, for the plaintiffs. According to the authorities with regard to such clauses in Inclosure Acts the question is whether it is a necessary implication from the words of the Act taken as a whole that the right of shooting in alieno solo is intended to be created or preserved to the lord of the manor. It is contended that from the words of this Act such an implication arises. The reservation clause must be construed without reference to the brackets which, like stops, are not really part of an Act of Parliament. The language of the exception shews that it was intended to give to the allottees the right of killing conies on their allotments, and, upon the principle of expressio unius exclusio alterius, it must be inferred that it was intended to reserve to the lord the right of killing all animals other than conies throughout the manor. The case falls within the decisions in *Ewart* v. *Graham* (3), and *Lord Leconfield* v. *Dixon* (4), not within that in *Sowerby* v. *Smith.* (5)

Gully, Q.C., in reply.

LORD ESHER, M.R. In this case the plaintiffs as trustees of the lord of the manor are claiming a declaration that they are entitled to the exclusive right of shooting game over a part of what was originally waste land of the manor, and which under the Inclosure Act has been allotted to the predecessors of the defendant. The defendant on the contrary claims that by virtue of his ownership of that land, which had been allotted to his predecessors, and of which he is now the legal owner, he is entitled to the shooting of game upon his own land. That question, it is admitted, depends solely upon the true construction of the Inclosure Act, under which the waste lands of that which admittedly was a manor belonging to the plaintiffs' predecessor were inclosed. It has been said that this Act of Parliament is

(1) 3 M. & G. 139.
(2) 5 H. & N. 609.
(3) 7 H. L. C. 331.
(4) Law Rep. 3 Ex. 30.
(5) Law Rep. 9 C. P. 524.

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to be considered as an agreement between the parties, and it may be that the view that it is a private Act of Parliament based upon a previous understanding or agreement between the parties ought to be considered in its interpretation; but that is not the sole point to be looked at. We must see whether any rules of construction have been laid down by an authority binding upon us, or by an authority with which we agree, although it may not be binding upon us, which will enable us to construe this Act one way or the other.

The leading case, in my opinion, as to the rule of construction of such Acts is that of *Sowerby* v. *Smith* (1), which is a decision in a Court of co-ordinate jurisdiction with this Court; unless, therefore, there is something in the present case which prevents the application of the rule there laid down, the principles of the judgment in that case are binding upon us. It has been suggested that that case is not binding upon us because it is in conflict with another case in the same Court; and that this Court must say which of the two it will follow. But the Court ought never to come to the conclusion that two cases in the same Court, or in Courts of co-ordinate jurisdiction, are in conflict, unless it is obliged to. I agree that if two cases are in conflict the Court must say with which of them it agrees; if, therefore, there were a case in the Exchequer Chamber in conflict with *Sowerby* v. *Smith* (1), we should have to decide which of the two we should follow. If the case of *Lord Leconfield* v. *Dixon* (2) is in conflict with *Sowerby* v. *Smith* (1), I am bound to say that I agree with the latter decision; but cannot they be reconciled? The judgment in *Sowerby* v. *Smith* (1) was carefully considered and upon examination will be found to lay down this principle, that in such Acts of Parliament as the present when the part of the waste which is allotted to a person in respect of his former rights of common is allotted to him expressly as his own freehold, the fact of the allotment being granted to him as his freehold gives him, primâ facie, the right of shooting game upon that freehold as fully as any owner of land in this country has the right of shooting game upon his own land. But it may be that there is something in the same Act of Parliament which shews that

(1) Law Rep. 9 C. P. 524. (2) Law Rep. 3 Ex. 30.

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although the allottee was to have the freehold he was not to have that full right as to shooting, which might be reserved to the lord. Under such circumstances it lies upon the lord of the manor who claims such a right to clearly shew that the Act contains such a reservation, and he must shew that the right is either reserved in express terms or by necessary implication. The language of Cockburn, C.J., is explicit; at page 531 he says: "The land having been allotted as freehold, the ownership must carry with it all the incidents which ordinarily attach to a freehold interest, unless, by the special provisions of the Act, some right has been reserved to the lord which would derogate from the ordinary rights of ownership in the soil; and the question turns therefore entirely on the effect of the reservation clause." Again, he says, at page 532: "It appears to me that the effect of the clause" (no doubt he is then about to speak of the particular clause before him, and not of a rule of construction, but he lays down a rule of construction at this point) "which, being in derogation of the right of freehold given by the Act to the allottees of the lands inclosed, must, I think, be construed most strictly against the party claiming under it." We have there a plain rule of construction, that inasmuch as the whole question depends upon the reservation clause, which is in derogation of the right of freehold given by the Act to the allottees of the land inclosed, that clause and any reservation contained in it must be construed most strictly against the lord of the manor. He expresses that rule still more strongly at page 537, where he says: "Independently, however, of authority, I arrive at the conclusion that nothing short of a positive reservation to the lord of the right of sporting over the inclosed lands, if not in express terms, at all events in language necessarily leading to such a conclusion, will suffice to entail on land allotted as freehold a burden of a feudal and onerous character inconsistent with the ownership in fee." Nothing could be clearer than that; and therefore, in the present case, the right claimed depends upon the reservation clause, and that clause is to be construed strictly against the lord in the manner there indicated. That judgment was given in the presence of Lord Bramwell, and was doubtless agreed in by him, although he does not in so many words express his agreement.

Now is there any case which lays down a contrary rule? It is said that *Lord Leconfield* v. *Dixon* (1) does so, and if that be so, we must say which of the two we agree with. If those cases are in conflict, it seems to me that the one lays down a clear and distinctly expressed rule of construction, whereas the other lays down no rule of construction at all, and I should therefore under such circumstances prefer to follow *Sowerby* v. *Smith*. (2) But if *Lord Leconfield* v. *Dixon* (1) can be distinguished from *Sowerby* v. *Smith* (2), it ought under such circumstances to be distinguished. As to the case of *Lord Leconfield* v. *Dixon* (1) I may say that if I had had to consider it after the case of *Sowerby* v. *Smith* (2), and therefore to apply to it the rules of construction to be found in *Sowerby* v. *Smith* (2), I doubt whether I could have held that the reservation was sufficiently clear according to the rule laid down. But I do not desire to dissent from *Lord Leconfield* v. *Dixon* (1), which I think may be brought within the rule. The words "hawking, fowling, and all beasts and birds considered as game" and the exception, "except such as are expressly taken away by this Act," were much considered in the judgment, and at p. 33 Bovill, C.J., says, "Looking to the general scope and object of the 34th section, and to the language which is there used, it appears to us to amount to an enactment that the lord shall, at all times for ever thereafter, have, take, and enjoy all piscaries, fishing, hunting, hawking and fowling, and all beasts and birds considered as game, and all other royalties, liberties, privileges and appurtenances whatsoever, except such as are expressly taken away by the Act." He relies upon those words to get at the implication; and it is not necessary to say more now than that they might be sufficient for the purpose. Now the words upon which the Exchequer Chamber decided that case are not found in *Sowerby* v. *Smith* (2), nor are they to be found in the Act which we are now construing. I think, therefore, that *Lord Leconfield* v. *Dixon* (1) may fairly be held to come within the class of cases in which the right, although not expressly reserved, is reserved by necessary implication and that therefore it falls within one of the rules laid down in *Sowerby* v. *Smith*. (2) As to the case of *Ewart* v. *Graham* (3) I entertain no doubt;

(1) Law Rep. 3 Ex. 30. (2) Law Rep. 9 C. P. 524. (3) 7 H. L. C. 331.

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although the right was not reserved in express terms, the language used raises a necessary implication of the reservation, for there are words in that case which to my mind shew clearly not only that the right of shooting was reserved, but that it was reserved over the lands inclosed under the Act after they were inclosed. That is a case clearly within the rules, and accounts for the language of Cockburn, C.J., that the right must be either expressly reserved or in language which produces the necessary implication that it is reserved. Therefore, the right of shooting must not only be reserved generally, but must be reserved over the lands inclosed under the Act, and declared in the Act to be the freehold of the allottee.

But there is more to be gathered from *Ewart* v. *Graham.* (1 In that case the early case of *Greathead* v. *Morley* (2) was considered, and the House of Lords held that the decision in that case was not overruled; we must, therefore, consider the decision in *Greathead* v. *Morley.* (2) Now although in that case the rule is not laid down in such distinct terms as in *Sowerby* v. *Smith* (3), it seems to me that the same rule is in effect laid down. We therefore find one of the earliest cases in regard to Inclosure Acts laying down a rule of construction, and the last case laying down the same rule in most distinct terms, and we also have, between those two cases, one case which is most clearly within a part of the rule and another which we cannot say now was not within the rule. Therefore the rule of construction seems to me to be clear, and we have only to apply it to this particular statute.

Now the application of the rule to any one of these statutes can seldom or ever be quite clear, owing to the want of care with which they are generally drawn. It would seem that the draughtsman, without inquiring into the facts of the manor with which he is about to deal, puts in every possible word, whether applicable to the particular case or not, which he thinks may possibly apply: this makes the construction of these statutes a matter of some difficulty. Without going through the whole statute we find, on page 15, the clause by which the residue was directed to

(1) 7 H. L. C. 331. (2) 3 M. & G. 139.
(3) Law Rep. 9 C. P. 524.

be allotted between the lord and the other persons entitled to allotment. Then, upon p. 19, the rights of the allottee are set out in more distinct terms than usual, and the allotments and appropriations are declared to be freehold to all intents and purposes whatsoever. Nothing can be stronger than that language; and that it gives the right in dispute here to the allottee, if there were no reservation, cannot be doubted; we must therefore see if, applying the rule of construction of which I have spoken, the right has been reserved to the lord.

Can we get either the express reservation or a necessary implied reservation out of the reservation on p. 26, construing it strictly, where there is any doubt, against the claim of the lord? The first part of the reservation is in negative terms; and, stopping at the end of that part, it is impossible to my mind to say that by it the right is reserved at all; certainly it is not reserved expressly, and I see no language in it from which to draw any implication in favour of the lord of the manor. The negative part would seem to be a sufficient mode of reservation for all purposes; but, as is usual in Inclosure Acts, the draughtsman goes on to make a sort of affirmative enumeration of what he meant to negative in the first part. It may be that when he comes to enumerate affirmatively the things that he meant to reserve, he will go further than what he has negatived in the first part, and if he does go further, and does it with sufficient clearness, it is a matter that must be dealt with. In *Ewart* v. *Graham* (1) that was done; there was an affirmative reservation of the right to shoot over the inclosed land of the allottees; the right was given as an affirmative grant. In *Lord Leconfield* v. *Dixon* (2), taking that case in the way in which I have already said we are bound to take it, the same was done; and the question is whether that was done here. The affirmative reservation is in these terms: "But that the said Frederick Earl of Carlisle, and all and every person or persons claiming by, from, or under, or in trust for him as lord of the said barony and manors, and all succeeding lord and lords, lady and ladies, and owners thereof for the time being shall and may at all times for ever hereafter have, hold, take, and enjoy, all rents, services, courts,

(1) 7 H. L. C. 331.

(2) Law Rep. 3 Ex. 30.

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perquisites and profits of courts and mills (except for the grinding and grist of malt), piscaries, fishing, hunting, hawking and fowling, goods and chattels of felons and fugitives, felons of themselves, and put in exigent, deodands, waifs, estrays, forfeitures, escheats, and all other royalties, liberties, franchises, privileges, pre-eminences, jurisdictions, and appurtenances whatsoever to the said barony and manors, or to the lord or lords, lady or ladies thereof for the time being incident, appertaining, or belonging, or which have been anciently used, exercised and enjoyed by the lord or lords, lady or ladies, of the same barony and manors." If it stopped there, would it do? It is said that the word "fowling" contains the right of shooting. It probably does; but I cannot think that these words are sufficient to shew that the lord has reserved to himself the right of shooting over inclosed land which has been given to the allottee as his freehold. If they are, it seems to me that *Sowerby* v. *Smith* (1) and *Greathead* v. *Morley* (2) were wrongly decided.

Now we come to the exception commencing "other than and except," as to which I desire to say a few words for myself. It has been said that there are brackets in it, but that we must read it as though one of the brackets were removed to some other part of the clause. But if notice is to be taken of brackets, it must be subject to the language used, and then it may be shewn that either at both ends or at one end of the parenthesis the bracket must have been erroneously placed, and that the brackets must be put in the right place according to the sense and construction of the language used. To my mind, however, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops. I shall, therefore, read this exception according to its language, "other than and except such right of common pasturage and free warren in respect of conies which is intended to be extinguished as could or might be claimed by them or from them as owner or owners of the soil of the said moors commons and waste grounds." That is the exception, and that is grammatically the only way of reading it.

That being so, it is clear that there is here a blunder which

(1) Law Rep. 9 C. P. 524. (2) 3 M. & G. 139.

occurs with great frequency in these Inclosure Acts; whether that blunder consists in applying the claim of the lord, as owner of the soil, to manorial rights, or whether it is the opposite blunder, I cannot say. There is, therefore, a difficulty in construing this exception, for from one point of view it may reserve the right claimed for the lord, whereas from another it does not; and its meaning not being clear, it does not by necessary implication reserve the right. This case is, therefore, not brought within the rules laid down in *Sowerby* v. *Smith* (1), and therefore the right given to the allottee is an absolutely unqualified right to hold his allotment as a freeholder, with all the consequences of such a right. For these reasons I am unable to agree with the judgment of the learned Judge at the trial, and I think that this appeal must be allowed.

FRY, L.J. I have been asked by Lord Justice Bowen to give the next judgment.

As I am differing from the conclusion arrived at by the learned Judge at the trial, it is right that I should state somewhat fully the conclusion at which I have arrived. I shall not advert to the authorities beyond saying that I adopt the conclusion arrived at in the Court of Exchequer Chamber in the case of *Sowerby* v. *Smith* (1), as laying down the law for us to follow. If there be a difference between that case and the case of *Lord Leconfield* v. *Dixon* (2), I do not hesitate to say that I prefer the reasons and the views expressed in *Sowerby* v. *Smith*. (1) I think that that case does lay down a very clear, intelligible, and reasonable rule of construction, which is primâ facie the rule of construction to be applied to these Inclosure Acts. I may further say that the case of *Bruce* v. *Helliwell* (3) creates in my mind no difficulty; it is, I think, entirely consistent with the rule of construction laid down in *Sowerby* v. *Smith*. (1)

Premising thus much with regard to the authorities cited, I will direct my attention to the statute which we have to construe. It begins with a preamble in the usual form, which shews the object of the Inclosure Act. It recites that the waste lands

(1) Law Rep. 9 C. P. 524. (2) Law Rep. 3 Ex. 30.
(3) 5 H. & N. 609.

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were in their present state yielding but little profit to the persons interested therein, and therefore, of course, it followed that it was in the interest of those persons that the lands should be inclosed and allotted; that was the general object of all contracting parties who came before Parliament for the purpose of obtaining an Inclosure Act. The first provision which it seems necessary to consider is on p. 14, and directs the allotment of one-twelfth part of the residue of the wastes (after taking out certain lands for quarries, for roads, and for sale to pay the expenses of the Act) to the lord of the manor, and it was to be allotted to him "in lieu of, and as a full compensation for, the right and interest of the lord of the barony and manors in and to the soil of the residue of the said manors, commons, and waste grounds, except as is hereinafter mentioned." Pausing there, the lord gives up the whole interest he had in the remaining waste land of the manor, except as is subsequently mentioned; therefore we must find some subsequent mention to revive any right in the lord to the property. We find on p. 17 an indication of the intention of the legislature to reserve the minerals, metals, and coal mines to the lord; only an expression of an intention so to do, and we shall come to the actual reservation afterwards. Then on page 19 comes the clause which is perhaps the most important of all. After having directed an allotment in severalty of the residue of the waste land, it declares that from and after the award being executed and being deposited, "all and every the allotments and appropriations hereinbefore directed to be made shall and are hereby declared to be freehold to all intents and purposes whatsoever." No doubt it is quite true that that clause must be affected and conditioned by certain other portions of the statute; but, except so far as we find it derogated from by other portions of the statute, it gives to the allottee every right that a freeholder has in the soil, and among those rights, of course, is the right to take wild animals while upon his land. Then we find that the rights of common over the whole land are to cease upon allotment; and lastly, we come to the clause on p. 26, which is really the one on which the controversy rages.

That clause is essentially a saving clause. "Nothing in this

Act contained shall be construed or adjudged to defeat, lessen, or prejudice"—the object is therefore to prevent prejudice to the existing rights of the lord—"the right, title, or interest of the lord in or to the coal, lead, tin, copper, stone, or slate, minerals or metals within or under the said manors, commons, and waste grounds intended to be inclosed as aforesaid, save and except the stones in the public stone quarries to be set out as aforesaid." Now there is a direct reservation of the minerals, which but for that reservation would have passed to the allottee under the declaration that his allotment was freehold; and if there is to be found in the Act a reservation of something else which would otherwise pass under the term freehold, such as a reservation to the lord of the right to sport over the lands assigned to the allottees, one would expect to find it in this place, which is the proper part of the Act for such a reservation. But no such reservation can here be found, for the clause proceeds in these words: "or of, in, or to the seigniories and royalties, franchises and liberties, incident and belonging to the said manors." There are, therefore, three things which are not to be prejudiced by the Act: it is not to prejudice the right of the lord to the minerals, nor to prejudice his rights as lord of the manor, nor to prejudice any franchises, or rights in the nature of franchises, which, though not part of the manor at common law, were held by the lord as grantee from the Crown. In respect of all those three things his rights are preserved intact. But with regard to sporting, the Act is down to this point absolutely silent, although this is the proper place where such a right should be reserved, if at all.

Then the clause goes further and interposes a very lengthy sentence with the connecting words "but that." Now it is plain to me that what one should expect to find under such a clause would be an enumeration affirmatively of the rights which have been declared not to be prejudiced, or rather which have been saved by the preceding part of the clause. I quite agree that the clause may go further, and if it shews a clear intention to reserve something else to the lord, or to re-grant to him something new, full operation must be given to it; but primâ facie I think this part of the clause ought to be read as having reference to the previous part of the saving clause proper. Under this

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declaratory part of the clause the earl is to enjoy "all rents, services, courts, perquisites and profits of court and mills (except for the grinding and grist of malt), piscaries, fishing, hunting, hawking, and fowling, goods and chattels of felons and fugitives, felons of themselves, and put in exigent, deodands, waifs, estrays, forfeitures, escheats"; I pause there because the next part of the clause is separate. Now all those are either manorial rights, or they are franchises or rights in the nature of a franchise; they are either rights which are incident to the manor as a common law manor, or which are vested in the lord by grant from the Crown; many of them have no particular reference to waste lands, and would, so far as I can see, be wholly unaffected by the inclosure of the wastes; they appear to be put in simply ex abundanti cautelâ. It is curious to observe the connection in which these words "hawking, hunting, and fowling," come. They come among franchises, goods and chattels of felons, profits of courts, and mills, which may be manorial; they are therefore treated as if they were either manorial rights, or rights granted in the nature of franchises; and although they could not be manorial rights, they might belong to the latter class. For instance, supposing the lord of this manor had a right of free warren, which there is some reason to suppose he had, or a right of chase throughout the manor, that, although not properly a manorial right, would be a franchise attached to and incident to the manor, and these words would refer to such a right, if it existed in fact.

Then comes language which seems to be governed by what follows, "And all other royalties, liberties, franchises, privileges, pre-eminences, jurisdictions, and appurtenances whatsoever, to the said barony and manors, or to the said lord or lords for the time being incident, appertaining, or belonging." There we have an enumeration either of manorial rights, or of rights in the nature of franchises which are incident, or appertaining, or belonging to the manor. The clause proceeds, "or which have been anciently used, exercised, and enjoyed by the lord or lords of the same barony and manors (other than and except such right of common, pasturage, and free warren in respect of conies, which is intended to be extinguished) as could or might be

claimed by him, her or them as owner or owners of the soil of the said manors, commons, and waste grounds." There we come upon the difficulty which has been so much discussed, as to the effect of the brackets or marks of parenthesis in that clause. Now, whether brackets can or cannot be looked at if they appear on the Parliament Roll, I express no opinion; but if in the present case they exist on the roll, as it is said they do, I must read through them and pay no attention to them, for the sense is too strong for me to pause at these miserable brackets. It is quite plain to me that the words "such right" are followed in sense by the words "as could or might be claimed," and I cannot divorce them the one from the other; I cannot adopt the reading suggested in argument, and refer the words "such right" to the enumeration of rights several pages back in the Act, nor can I read the word "as" in immediate sequence with the words preceding the brackets. I think, therefore, that it is immaterial whether the brackets stand or not, and that the exception extends from the words "other than and except" down to the words "waste grounds."

Now, what is the force of the exception? For upon that arises the argument which has created to my mind the only substantial difficulty in the case. It has been urged upon us that it was clearly intended that the allottee should kill the conies, and that upon the principle of expressio unius exclusio alterius it must be inferred that he might kill nothing else, and that therefore it was intended that there should be a reservation to the lord of all animals other than conies. The argument is one which requires attention, and if I could adopt it I should consider that in the present case there was the necessary intendment from the language used, which was referred to by Cockburn, C.J., in *Sowerby* v. *Smith*. (1) But I cannot feel confident of the meaning of the passage, which seems to me to be obscure and confused and to have been drawn by some one who did not thoroughly understand the subject. It must be borne in mind that these are territorial rights, rights claimed by the owner of the soil; how then can territorial rights be an exception from manorial rights? I cannot answer the question. There seems to have

(1) Law Rep. 9 C. P. 524.

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been a further confusion in the mind of the draughtsman, who speaks of the right of common and the right of free warren as territorial rights, although we know that they are not so; neither of them is a right in the owner of the soil; both of them may exist in other persons' lands. The draughtsman, therefore, has treated a right which is in the nature of a franchise as a territorial right. On which side is the blunder? Was he really dealing with a franchise and speaking of it as if it were territorial, or was he really dealing with a territorial right and speaking of it as if it were a franchise? I cannot be sure. If, however, we knew the real history of this case, it is very possible that we should find that the lord was giving up to the tenants of the manor certain manorial rights, and had agreed to give up his right to mills, so far as related to the grinding and grist of malt, and also his right to conies throughout the manor, which is the reason for the exception of the mills and the expression of the intention to extinguish the right of free warren in respect of conies. If, therefore, I may speculate on the true meaning of this clause, I am inclined to think that it deals, not with a territorial right, but with a right of free warren throughout the manor, and that the lord agreed to give up the right of shooting conies to his tenants; but I am not sure that that is the true meaning, and the clause does not produce in my mind the necessary intendment that the lord was to shoot everything except the conies by virtue of his original right over the allotted lands. Had I been able to come to that conclusion, I should have thought the decision of the learned judge was right; but I think that, considering the obscurity of the clause, the better view is the other way, and that the judgment should therefore be reversed.

I ought to add that, in my opinion, the subsequent part of the clause is not entirely immaterial. It goes on to deal with the reservation of the minerals, which had been partly dealt with in the earlier part of the clause, and not only does it reserve them, but it goes on in express terms to create a new right in the lord and gives him a wayleave, a right of necessary way. Had it been intended to reserve the game to the lord, I think we should have found some similar words authorizing him to pass over the

lands of the allottees throughout the manor. The observation is possibly not a strong one; but seeing the precision with which the right to the minerals is reserved and the incidental right to ways is expressed, it is certainly probable that a similar reservation and expression would have been found, if it had been intended to deal with the game. I cannot help suspecting that at the time this statute was passed there was no game of any considerable value in this manor, that the matter was not thought worthy of attention, and that the lord gave up that right with the others to the allottees.

BOWEN, L.J., I concur.

Appeal allowed.

Solicitors for the plaintiffs: *Wing & Du Cane.*

Solicitor for the defendant: *E. Richardson, for Donald & Ostell, Carlisle.*

W. J. B.

THE DUKE OF NORFOLK *v.* LAMARQUE. *Jan* 20.

Revenue—Income Tax—Manor—"Profits"—Cost of Collection—Deductions—5 & 6 Vict. c. 35, *s.* 60, *Sched. A., No. II.*

In estimating the annual value of the "profits" of a manor for assessment to the Income Tax under 5 & 6 Vict. c. 35, s. 60, Sched. A., No. II., no deduction can be made in respect of expenses incurred by the lord of the manor in collecting the manorial dues, at any rate where it does not appear that such expenses must necessarily be incurred before the dues can be obtained.

Stevens v. *Bishop* (19 Q. B. D. 442; 20 Q. B. D. 442) considered.

CASE stated under 43 & 44 Vict. c. 19.

The appellant, lord of the manor of Dorking, was assessed to the Income Tax Schedule A. for the year ending April 5, 1889, in the sum of 178*l.* 9*s.*, being the amount which he admitted to have been received or to be receivable by him, on an average of the seven preceding years in respect of the profits of such manor for that year, but from which he claimed to deduct a sum of 38*l.*, being the costs incurred by him in the collection of the manorial rights, dues, &c., of the manor.

The appellant, by his steward, Captain E. H. Mostyn, appealed

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to the Commissioners of Income Tax against the assessment of 178*l.* 9*s.* for manorial rights, dues, &c., claiming an allowance of 38*l.* for costs of collection. The commissioners dismissed the appeal.

The question for the opinion of the Court was, whether the appellant, for the purpose of assessment to income or property tax in respect of the profits of such manor received by him, was entitled to deduct from the amount so received the costs incurred in the collection thereof, or any and what part of such costs.

The claim as limited and defined by a letter from the appellant's solicitors, which was admitted and referred to in the arguments, was "that he was entitled to deduct from the gross receipts of 178*l.* 9*s.*, being an average of fines and fees received during the past seven years, 28*l.* 16*s.* 11*d.*, yearly made up as follows: Portion of steward of manor's bill for law costs and expenses paid on an average of seven years, costs necessarily incurred in connection with the manor, 19*l.* 8*s.* 11d. Collection, 5*l.* per cent. paid to Reeves, 8*l.* 18*s.* Quit rent paid to manor of Reigate in respect of the manor of Dorking, 10*s.* Total: 28*l.* 16*s.* 11*d.* The law expenses were necessarily incurred in vindicating and supporting the duke's right, title, and privileges generally to the manor of Dorking, which is an extensive manor, and the sums paid were as follows," and they were therein stated.

Lyon, for the appellant. In 5 & 6 Vict. c. 35 (Income Tax Act, 1842), s. 60, Sched. A., No. I., is the general rule for estimating the hereditaments mentioned in the Schedule, and in No. II. are rules for estimating the hereditaments herein mentioned, which are not to be charged according to the preceding general rule. "The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year of the profits received therefrom within the respective times herein limited. . . . . Fourth, Of manors and other royalties, including all dues and other services, or other casual profits (not being rents or other annual payments reserved or charged), on an average of the seven preceding years, to be charged on the lord of such manor or royalty, or person renting the same."

It must be admitted that the allowances claimed are not amongst the deductions expressly mentioned in the Act, and also that by s. 72 the profits could be charged while in the hands of the appellant's receiver. But they have not been so charged.

Although the claim in the letter of the appellant's solicitors includes some items which could not be considered as sums expended in collection, yet if there is any which the appellant has been compelled necessarily to incur in collection he is entitled to take it into account in ascertaining the annual value of the profits upon which he is to be assessed. In s. 60 "annual value" and "profits received" are synonymous terms. No profit is "received" until the amount necessarily expended in collecting the dues and fines is taken into account. The words "annual value" in s. 52 when dealing with the tithe commutation rent charge mean the sum which the tithe owner actually receives after deducting sums paid for rates and procurations, and also the sum which he necessarily and properly expends, and is compelled to expend in order to realize his tithe: *Stevens* v. *Bishop*. (1) In that case the argument for the Crown was based on the fact that though the first three paragraphs of the second rule of this section dealt with tithes, the case of commutation tithe rent charge was omitted. The Divisional Court considered that whether it was to be taken under Sched. A., No. I., as being tenements or hereditaments capable of actual occupation, or whether it came under No. II., the result was the same, viz., that the appellant was entitled to the allowance that he claimed. The Court of Appeal thought that No. 1 was the rule applicable. The Crown in that case admitted the necessary outlay; and A. L. Smith, J., said: "No one, we suppose, would say, nor could it be successfully contended, that if a tithe owner had to pay upon profits he was to pay upon the gross amount of the tithe without allowing the necessary outgoings to realize such tithe."

[HAWKINS, J. Can the owner of a house deduct the cost of collecting his rents?]

In the Court of Appeal, Lord Esher, M.R., said (2): "I should be disposed myself to think that in all cases, where in the ordinary course of things a collector would be employed, the deduc-

(1) 19 Q. B. D. 442.

(2) 20 Q. B. D. 442, at p. 448.

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tion for the expenses of collection ought to be allowed." It would be, not only the ordinary course of things but the rule, that a collector would be employed to collect the dues and fines of a manor. The present case does not negative the fact that there are costs of collection.

[HAWKINS, J. There is no concession as in *Stevens* v. *Bishop* (1), and no statement in the case that the payment was "necessarily" made, and the letter, which is carefully expressed, while stating that the law expenses and costs to the steward were "necessarily incurred," does not state that the costs of "collection" were "necessarily incurred." What distinction in principle can be made between a person who collects his dues himself, and a nobleman who employs some one to collect them? It comes to this, that out of the profits which the property itself yields a certain portion is paid away to others to do that which the owner would rather do by deputy. It may be usual and convenient for an owner of large estates to employ a collector, but can it be said that the cost of collection under all circumstances ought to be deducted as a "necessary" expense?]

Sir R. E. Webster, A.-G. (*Dicey*, with him), for the Crown. The deductions claimed in the letter from the solicitors of the plaintiff are in respect of:—1. Law costs. 2. Expenses of collecting dues. 3. Quit rents. The first cannot possibly be maintained, and the last has been abandoned. Then as to the expenses of collection. By s. 72, when any assessment shall be charged on the profits of manors or royalties, or any other annual or casual profits not distrainable, the owner or occupier, "or receiver of the profits thereof," shall be answerable for the duties charged thereon, and may retain and deduct the same out of such profits. Therefore it was admitted that the agent of the appellant who received these profits might have been assessed as receiver. He certainly would not be entitled to deduct a commission. The observations of the Court of Appeal in *Stevens* v. *Bishop* (2), made with respect to tithes, are inapplicable to the present case of manorial dues. By s. 60, Sched. A., No. I., which applies to tithes, the annual value of them shall be understood to be the rent by the year at which the same are let at a rack rent . . .

(1) 19 Q. B. D. 442. (2) 20 Q. B. D. 442, at p. 448.

or the rack rent at which the same are worth to be let by the year. It contemplates the letting of tithes, and of course no one would take them without some abatement for the cost of collection. This rule shall be construed to extend to all hereditaments capable of actual occupation, ... "except the properties in No. II. and No. III. . . . ." Therefore rule No. I. does not apply to manors and other royalties the annual value of which is by No. II. to be the "full amount for one year . . . of the profits received."

By s. 159, it shall not be lawful to make any other deductions than such as are expressly enumerated in this Act. It is admitted that the deduction claimed is not one of those enumerated in the Act. The limits of the deduction clause would be avoided altogether if the words "full amount" were to be read as meaning "full amount subject to proper deductions." The legislature must have assumed that a lord of the manor would not personally collect his dues; but nevertheless did not prescribe any allowance for the cost of collection. *Stevens* v. *Bishop* (1) proceeded on the express admission in that case that the amount in question was an amount which the appellant had necessarily and properly to expend and was compelled to expend in order to realize his tithe.

POLLOCK, B. I think that the argument for the appellant must fail. It was properly admitted that the amount claimed as a deduction was not a "deduction" specified in the Act, and that admission seems to me to go a little further than might, at first, appear, because the deductions and allowances provided for in the Act are in respect of items very like these claimed for collection, that is to say, they are not items which must necessarily be deducted before any fixed sum can be arrived at, as, in the case of manufactures, an outlay for rent, materials, salaries of clerks or workmen, but are items which would come under consideration after the profit derived from the particular subject-matter which is taxed is obtained. Then is it a deduction which is to be made before the amount to be returned for taxation can be arrived at? It certainly is not so under the words of the Act

(1) 19 Q. B. D. 442, at p. 443.

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requiring a return, because every lord of a manor has to return the amount of all dues and other services, or other casual profits of such manor on an average of seven years. When we turn to rules I. and II. of Sched. A., there arises to my mind the greatest difficulty, perhaps from the way in which the word "profits" is used in No. II. No analogy whatever can be drawn from the profits of manufactures or mercantile business, because there the word "profits" necessarily means that which is earned after a certain outlay made for the purpose of earning it, and it cannot be said that expenditure in the collection of rent is money spent for the purpose of earning the rent—it is simply money spent for getting in that which belongs to the owner. This case clearly comes under No. II., and the use of the word "profits" there is not quite felicitous. It is found in a rule which is for estimating lands, tenements, hereditaments, or heritages, which are not to be charged according to the preceding rule 1; and the annual value of those is to be understood to be the full amount for one year, or the average amount for one year of the profits received therefrom. "Profits" there does not mean profits in the sense of net profits in a mercantile business, but the average amount for one year of the interest or property that the person has in those rights which are taxed. Then in No. 4 of r. II., dealing with manors and other royalties, the words are, "On an average of the seven preceding years, to be charged on the lord of such manor, or royalty, or person renting the same." It seems to me to be clear, therefore, that this is to be treated exactly as if it were a rent issuing out of property which belonged to the lord in fee simple. The only other doubt that I have in my mind arises from the case of *Stevens* v. *Bishop* (1), and I think, in the first place, that there is some distinction between the two cases, because, as my brother Hawkins pointed out during the argument, Sched. A., No. I., says, in the case of tithes, if the property has not been let at a rack rent, then the value is to be taken "at the rack rent at which the same are worth to be let by the year." Of course then it would involve putting up those tithes to auction, or offering them for sale by private contract, and in contemplating what the tenant would give for them the expense of

(1) 19 Q. B. D. 442.

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collection may have to be considered. But the real and main ground of the decision, right or wrong, in that case, is clearly, as stated by A. L. Smith, J.—the admission by the Crown that the 12*l.* 18*s.* was an amount which the Rev. Dr. Stevens had necessarily and properly to expend, and was compelled to expend, in order to realize his tithe. We have not the facts before us which indicate why it was so, but the admission is sufficient. If this were a case in which the rents could not be got in any shape or way without expenditure, and the parties were compelled to expend money in order to get them, it would be a different matter. I think, for the reasons I have just given, that this is a case in which the full amount collected is properly taxable, therefore this appeal must fail.

HAWKINS, J. I am of the same opinion. I do not think it necessary to add anything to what I said during the argument.

Appeal dismissed.

Solicitors for appellant: *Few & Co.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

J. R.

COLQUHOUN *v.* HEDDON.

Jan. 20.

Revenue—Income Tax—Deductions—Premium on Life Insurance—Insurance Company abroad—16 & 17 *Vict. c.* 34, *s.* 54; 16 & 17 *Vict. c.* 91, *s.* 1.

By the Income Tax Act (16 & 17 Vict. c. 34), s. 54, provision is made for the deduction of the premium on life insurance from assessments under Schedule D., and by 16 & 17 Vict. c. 91, s. 1, the benefit of the provision is extended to any person who shall have made insurance on his life "in or with any insurance company existing on November 1, 1844, or in or with any insurance company registered pursuant to 7 & 8 Vict. c. 110.":—

Held, that the provision does not apply to an insurance with a foreign company, although such company was in existence on November 1, 1844.

CASE stated under 43 & 44 Vict. c. 19, s. 59.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts, William Frederick Heddon appealed against an assessment of 62*l.* under Schedule D. of 16 & 17 Vict. c. 34, for the year ending April 5, 1887, made upon him, and

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claimed that he should be allowed by way of deduction from the assessment the sum of 6*l.* 4*s.* 2*d.* paid by way of premium on an insurance for 300*l.*, effected by him with the New York Life Insurance Company under the following circumstances.

In the year 1886 the appellant paid to the New York Life Insurance Company the sum of 6*l.* 4*s.* 2*d.*, being one year's premium due to the company in respect of a policy of assurance for the sum of 300*l.* duly effected with the insurance company on December 5, 1883.

The New York Life Insurance Company was incorporated by special Act of the Legislature of New York, dated May 21, 1841, as a marine and fire insurance company, extended by an Act of State, dated April 18, 1843, to life insurance.

It was contended by the Surveyor of Taxes, on the above facts, that the provisions of the Acts cited in the case (1) referred only

(1) By 16 & 17 Vict. c. 34, s. 54, any person who shall have made insurance on his life . . . in or with any insurance company which shall become registered under any Act to be passed in the then present session of Parliament for that purpose, and which shall comply with the requirements of such Act, shall be entitled to deduct the amount of the annual premium paid by him for such insurance from any profits or gains in respect of which he shall be liable to be assessed under Schedule D. of the said Act, or to have any assessment which might be made upon him under the said schedule reduced or abated by the deduction of the amount of the said annual premium from the amount of the profits or gains on which such assessment has been made.

By 16 & 17 Vict. c. 91, reciting the said last-mentioned Act, and that, as it might happen that an Act for the registration of insurance companies might not be passed in the then present session of Parliament, it was expedient that the benefit of the recited provision should for a limited time be extended to persons insuring or contracting with such insurance offices as thereinafter mentioned, it was enacted:—

1. "Any person who shall have made any such insurance, or contracted for any such deferred annuity as in the said provision mentioned in or with any insurance company existing on the 1st day of November, 1844, or in or with any insurance company registered pursuant to the Act of the session holden in the 7th and 8th years of Her Majesty, c. 110, for the registration, incorporation, and regulation of joint stock companies, shall be entitled to all the benefits and advantages which by the said provision are expressed to be given in respect of the like insurance or contract in or with any insurance company which shall become registered under any Act to be passed in the present session

to insurance companies existing in the United Kingdom, and did not relate to the New York Life Insurance Company, and that Mr. Heddon was consequently not entitled to the reduction of the assessment claimed by him.

The commissioners were of opinion that the New York Life Insurance Company came within the provisions of the Act, and that the appellant was entitled to a reduction from the amount of his assessment of the sum of 6*l.* 4*s.* 2*d.* premium paid by him, and decided accordingly.

Sir R. E. Webster, A.G., and *Dicey*, for the Crown. The Acts under which the deduction of the assessment was claimed relate only to English insurance companies, and therefore the appellant is not entitled to deduction in respect of any premium paid to the American company. The case would be unarguable if the deduction were claimed in respect of a foreign insurance company formed after the year 1844. It is also clear as to foreign companies incorporated prior to that year. 16 & 17 Vict. c. 34, s. 54, refers to an insurance with any insurance company, "which shall become registered under any Act to be passed in the present session of Parliament for that purpose." No such Act was however passed in that session. But in the next session the benefit of the provision of s. 54 was applied by 16 & 17 Vict. c. 91, which, after reciting the provision, enacted that any person who should have made any such insurance as in the said provision mentioned in or "with any insurance company existing on November 1, 1844, or in or with any insurance company registered pursuant to the Act 7 & 8 Vict. c. 110, for the registration, incorporation, and regulation of joint stock companies," should be entitled to all the benefits of the said provision. The Joint Stock Companies Act, 7 & 8 Vict. c. 110, only applies

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of Parliament for that purpose."

The provisions of the above-stated Acts were in force on April 5, 1886.

By the Customs and Inland Revenue Act, 1886, s. 5:—

"All such provisions contained in any Act relating to income tax as were in force on the 5th of April, 1886, shall have full force and effect with respect to the duties of income tax granted by this Act, as far as the same shall be consistent with the provisions of this Act."

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to companies in the United Kingdom. The commissioners thought, that as this company was in existence on November 1, 1844, the respondent was within 16 & 17 Vict. c. 91. But the Act does not relate to any other companies than those amenable to English law. If the intention of the legislature had been to include any foreign companies, there was no reason for drawing the line so as to include those formed before the year 1844, and to exclude foreign companies formed after 1844. The reason for fixing the year 1844 was that, prior to that date, there was no obligation on commercial associations to register themselves, whereas companies formed after that date must be registered under 7 & 8 Vict. c. 110, which is applied by s. 2 to "every joint stock company as hereinafter defined, established in any part of the United Kingdom of Great Britain and Ireland, except Scotland, or established in Scotland and having an office or place of business in any other part of the United Kingdom for any commercial purpose . . ." Assurance companies are expressly included in the term "joint stock company" together with "every institution enrolled under any of the Acts of Parliament relating to friendly societies which institutions shall make insurances on lives," and by s. 4 to 7 these companies must be registered. The Act is evidently restricted to companies in the United Kingdom, which alone can be subject to the requirements of it. In *Bulkeley* v. *Schutz* (1), James, L.J., said of the Companies Act, 1862, that that Act never contemplated that a foreign partnership actually complete and existing in a foreign country could be brought within the purview of the English Act of Parliament, the English legislature having no power over the shareholders of such a company.

Finlay, Q.C., (*Bremner*, with him), for the appellant. The insurance company is undoubtedly within the terms of 16 & 17 Vict. c. 91, s. 1, "any company existing on November 1, 1844." They include a foreign company then in existence just as the words "any person" would include a foreigner. It cannot be assumed, on the part of the Crown, that the Act contemplated by the legislature in 1853 as about to be passed in the then session, would not include foreign companies. The provisions for the

(1) Law Rep. 3 P. C. 764, at p. 769.

deduction of a premium from the assessment are not intended to benefit insurance companies, but to encourage thrift by giving an advantage to persons who insure their lives, and thereby provide for their families. It is consequently immaterial whether the insurance is with a British or foreign office. An insurance in a Scotch company existing on November 1, 1844, would be within the terms of s. 1. There are Scotch insurance companies not within the provisions of the Joint Stock Companies Act, 1844, as to registration, and yet within the provisions of the Acts as to abatement of income tax. The Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61) is not limited to English companies, for in s. 2 the term company "means any person or persons, corporate or unincorporate, . . . who issue or are liable under policies of assurance upon human life within the United Kingdom," and this company falls within that definition.

That registration of the company is not the test of the exemption in the Income Tax Acts of 1853 is shewn by the distinction drawn between "any insurance company existing on November 1, 1844," and "any insurance company registered," and although by s. 58 of the Joint Stock Companies Act, 1844, all companies to which that Act applied, and in existence on November 1, 1844, must be registered within three months, there was no obligation to register insurance companies not within that Act.

Sir R. E. Webster, *A.G.*, in reply. The English Acts do not treat foreign associations as companies. It was contended that the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61) does so. But the definition clause shews the contrary. The returns required by the Act are made not because the insurers are a company, but because they come within the words "persons unincorporate . . . who issue policies of assurance upon human life within the United Kingdom." No authority has been cited for the proposition that the word "company" includes a foreign company, and *Bulkeley* v. *Schutz* (1) decided that it does not.

Evidence that the legislature in 1853 did not contemplate the passing of an Act which would include foreign companies is afforded by the fact that the Act which was, in fact, passed, did not include them. If the encouragement of thrift were the

(1) Law Rep. 3 P. C. 764.

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object of the allowance there would be no reason for restricting the provision for abatement of income tax in 18 & 19 Vict. c. 35, to insurance with friendly societies "legally established under any Act of Parliament relating to friendly societies." There were many solvent friendly societies unregistered.

7 & 8 Vict. c. 110, compels joint stock companies existing in 1844 to register within three months, and that provision shews that the Act cannot apply to the New York company, which could not be registered under the Act.

The contention for the appellant must result in this, that no deduction of a premium paid to an English company can be allowed unless the company is registered, but a premium paid to a foreign company, although unregistered, may be deducted.

POLLOCK, B. This appeal must be allowed.

The case is one of importance financially, for it is common knowledge that large and solvent insurance companies are established abroad in which many of Her Majesty's subjects insure their lives. It is not disputed that except for some express statutory exceptions the amount which it is sought to tax would be taxable under the Income Tax Acts, and until the year 1853 there could be no doubt whatever that income tax must be paid. At that period after consideration by Parliament for many years of the arguments used as to the hardship, as it was called, of taxing professional incomes upon the same basis as sums which had long been realized and had become capital in every sense of the word, those arguments prevailed to this extent, that the legislature chose to say that in certain cases where a man's thrift had taken the form—not merely of investing his money so that it became capital, but of insuring his life—an exception should be made in his favour to the extent of the amount of the premiums paid for such insurance, and accordingly the Act 16 & 17 Vict. c. 34 passed in the session of 1853, made, by s. 54, this exception, "Any person who shall have made insurance on his life or on the life of his wife, or shall have contracted for any deferred annuity on his own life or on the life of his wife, in or with any insurance company which shall become registered under any Act to be passed in the present session of Parliament for that purpose, and

which shall comply with the requirements of such Act, and any person who shall under any Act of Parliament be liable to the payment of an annual sum, or to have an annual sum deducted from his salary or stipend, in order to secure a deferred annuity to his widow or a provision to his children after his death, shall be entitled to deduct the amount of the annual premium paid by him for such insurance or contract." It is clear that Parliament contemplated the passing of some Act dealing with the registration of companies. But, apart from that, I am convinced that when in an English Act of Parliament the words "any insurance company" are used, those words mean a company within the United Kingdom and within the cognizance of English law and legislation. In the first place the word "company" in itself denotes—not a mere firm of persons which in a mercantile sense might be the same in whatever part of the world it was established—but an entity, and a legal entity the validity and effect of which must depend upon the laws of the country within which that company is established. Therefore upon all ordinary principles, it seems to me sufficient to say that the words "insurance company" in this English Act of Parliament mean an insurance company within the purview of the English legislature, and therefore within England.

But I think it is equally important to shew that the legislature has treated not only of English companies generally, but of companies which *shall* become registered by an Act which was supposed then to be about to be passed. No such Act was passed, but the intention on the part of the legislature remains the same. Then by 16 & 17 Vict. c. 91, after reciting that it might happen that no Act for registration of insurance companies might pass in that session, it is enacted that "any person who shall have made any such insurance or contracted for any such deferred annuity as in the said provision mentioned, in or with any insurance company existing on the 1st day of November, 1844, or in or with any insurance company registered pursuant to the Act 7 & 8 Vict. c. 110" (the registration of Joint Stock Companies Act), should be entitled to the benefit of the deduction aforesaid. There again the same arguments arise upon the words "any insurance company" as denoting an English

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company. The date fixed, November 1, 1844, obviously has reference to 7 & 8 Vict. c. 110 which was passed on September 5, 1844, and in that Act, November 1 is the material time after which all joint stock companies which may be started in England are to be registered. Therefore it seems to me clear from the language used that the intention is that it should be an English company and a registered company. I think it is obvious that the legislature never could have intended to provide this exemption in favour of all persons insured in any part of the world, not with "any person," because that would not do, but with "any company," because who is to say what is a company, and what security the British Government would have in collecting their revenue from persons insured with entities that were called "companies" in some foreign country?

But the last argument used by the Attorney-General seems to me absolutely conclusive; and that is this, that with regard to companies not then registered, but which had to be registered, this extraordinary result would follow: if the argument for the appellant be right, you never could get this deduction where your payment of premium was to an English company unless it was registered; but you could get your deduction if it was a foreign company, although it was not registered. That certainly amounts, in my mind, looking at the purpose and intent of this legislation, to a reductio ad absurdum.

HAWKINS, J. I am of the same opinion. The real and only question seems to be, what is the meaning of the words in 16 & 17 Vict. c. 91, s. 1, "with any insurance company existing on November 1, 1844, or in or with any insurance company registered pursuant to the Act," 7 & 8 Vict. c. 110, for the registration of joint stock companies? The respondent contends that "any insurance company" is to be read simply according to the natural interpretation of those words without reference to any limitation such as is sought to be imposed upon them on the part of the Crown. I am of opinion that they are not so to be construed, and for this short reason. It is clear that when the Income Tax Act of 1853 was passed, it was in contemplation that there would be passed during the session of 1853 an Act

relating to the registration of insurance companies, and that an exemption in favour of any insurance with one of the companies contemplated by that Act would be allowed as mentioned in 16 & 17 Vict. c. 34, s. 54. Then came c. 91, passed in the same session of 1853, which, after reciting s. 54, further says that "as it may happen that an Act for the registration of insurance companies may not be passed in the present session of Parliament, it is expedient that the benefit of the recited provision should for a limited time be extended to persons insuring or contracting with such insurance offices as hereinafter mentioned." Then it proceeds to enact that, "Any person who shall have made any such insurance or contracted for any such deferred annuity, as in the said provision mentioned, in or with any insurance company existing on the 1st day of November, 1844, or in or with any insurance company registered pursuant to the Act," 7 & 8 Vict. c. 110, shall be entitled to the benefit of 16 & 17 Vict. c. 34, s. 54. There must be some meaning in the words "1st day of November, 1844," and some reason for the insertion of these words in c. 91, and I find the reason on looking at the 7 & 8 Vict. c. 110, the statute for the registration of joint stock companies. Sect. 2 interprets the meaning of "joint stock company," and the operation of the Act is stated in these terms: "This Act shall apply to every joint stock company as hereinafter defined established in any part of the United Kingdom of Great Britain and Ireland, except Scotland, or established in Scotland, and having an office or place of business in any other part of the United Kingdom, for any commercial purpose, or for any purpose of profit, or for the purpose of assurance or insurance (except banking companies)" and so on—and the word "company" in the 3rd section is defined to mean "any joint stock company or other institution as before defined." That Act was by s. 1 to come into operation upon November 1, 1844. When I read the words of s. 1 of the 16 & 17 Vict. c. 91, which provides that "any person who shall have made any such insurance . . . with any insurance company existing on the 1st day of November, 1844, or in or with any insurance company registered pursuant to the 7 & 8 Vict. c. 110," my mind is brought to the conclusion, that the legislature meant and that we ought to construe the section

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as meaning "any insurance company which existed and was carrying on business in England on the 1st day of November, 1844, on which day the 7 & 8 Vict. c. 110, was to come into operation, or any insurance company registered pursuant to that Act," and although these words are very general, looking at them without reference to the previous enactment, I cannot think that it was ever contemplated by the legislature that any other company should be brought within the meaning of this section, which I have just read, except such companies as those to which the 7 & 8 Vict. c. 110, applied, which were in existence upon November 1, 1844, or which might be registered after that date. I do not refer at all to the later statute relating to insurance companies, because it does not seem to me to affect the present argument, or to have much bearing upon the subject. I think that this appeal ought to be allowed.

Judgment for the Crown.

Solicitors for Crown: *Solicitor of the Inland Revenue.*
Solicitors for appellant: *Ashurst, Morris, Crisp & Co.*

J. R.

Jan. 21, 22.

GRESHAM LIFE ASSURANCE SOCIETY *v.* STYLES.

Revenue—Income Tax—Annuities payable out of Profits or Gains—Assessment of Profits or Gains—Income Tax Acts—5 & 6 Vict. c. 35, *s.* 102.

An insurance society granted life annuities in consideration of a single sum paid by the applicant at the time of granting the annuity, and they claimed to deduct from the amount of their profits chargeable with income tax the sums paid by them in discharge of the annuities so granted:—

Held, that the annuities were paid out of "profits or gains" within the meaning of 5 & 6 Vict. c. 35, s. 102, and were therefore chargeable with income tax in the hands of the society by virtue of that section.

CASE stated for the opinion of the Court by the Commissioners for General Purposes of the Income Tax Acts for the City of London, under 43 & 44 Vict. c. 19, s. 59, stating, in substance, the following facts:—

The Gresham Life Assurance Society carries on the business of life assurance, and of granting annuities. The consideration for the granting of an insurance of a lump sum payable on death is

either the payment periodically of sums of money or premiums, or in some cases the payment of a lump sum as a single premium paid at the time of effecting the insurance. The consideration for the granting of an immediate annuity is the payment of a lump sum or premium paid down.

The annuity obligations of the society when undertaken are in many instances dischargeable abroad. The returns of the society, as regulated by the Life Assurance Companies Act, 1870, are based (inter alia) upon actuarial calculations of prospective liabilities under existing contracts.

The return for the three years ended June 30, 1885, shewed by the account, called the "Valuation Balance Sheet," a surplus profit for three years of 97,553*l.* 2*s.* 9*d.*, from which was deducted the surplus brought forward from the previous triennium of 4496*l.* 6*s.* 1*d.*, leaving a balance of 93,056*l.* 16*s.* 8*d.* The society, during the three years ending June 30, 1885, paid income tax on 120,722*l.*

The society, in arriving at the amount of profits and gains for the three years, amounting as above shewn to 93,056*l.* 16*s.* 8*d.*, had taken into account as items of expenditure (among other items) the sums paid in discharge of its annuity contracts amounting to 253,252*l.* 5*s.* 10*d.*, and the sum of 3247*l.* paid for income tax. These two latter sums, added to the above sum of 93,056*l.* 16*s.* 8*d.*, amount to 349,556*l.* 2*s.* 6*d.* From this amount the surveyor of taxes allowed the sum of 120,722*l.*, upon which tax had already been paid, to be deducted, and claimed that the society were chargeable for the three years with the difference of 228,834*l.* 2*s.* 6*d.* One year's proportion of this sum amounts to 76,278*l.* 0*s.* 10*d.*, for which amount the society was assessed for the year ending April 5, 1886.

The commissioners confirmed the assessment and stated a case, the question for the opinion of the Court being: "Whether the society is liable to be assessed in respect of the amount paid by them for annuities or any part thereof."

Sir H. Davey, Q.C. (*Lumley Smith, Q.C.*, and *W. Fooks*, with him), for the appellants. Under s. 102 of 5 & 6 Vict. c. 35 the obligation to deduct income tax from annuities arises when they

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are paid out of "profits or gains," which are chargeable to income tax by virtue of the Act. It is a fallacy to say that the annuities are paid out of profits or gains because the profits or gains of the society would be so much the greater if the annuities were not paid. In the case of *Last* v. *London Assurance Corporation* (1) it was decided, in the Court below, that life insurance premiums are not profits or gains, and that part of the decision was not reversed. The same argument applies also to these annuities.

This society is a dealer or trader in annuities, and the same principles must be applied in estimating their profits as in the case of any other trader; the liability to pay the annuities must be set off against the payments which are made in consideration of the contracts to pay those annuities. The difference between the amount of receipts in respect of the annuities, and the estimated liability upon those annuities, is the true amount of the profit made by the society.

Sir E. Clarke, S.G. (*A. V. Dicey*, with him), for the Crown, was not heard.

POLLOCK, B. This case has been so fairly argued on behalf of the appellants that we think it unnecessary to call upon the respondent.

We cannot decide this appeal in favour of the appellants without contravening not only the actual provisions of the Income Tax Acts, but the spirit of those Acts, as acted upon, not only by lawyers, but by commercial men, for a long series of years.

The real question in this case is whether this society, who have, pursuant to their contracts and mode of business, to pay certain annuities, are the proper persons to be taxed in respect thereof, or whether the recipients of those annuities ought to be, and must be, taxed in the first instance.

In order to get at the profits or gains upon which the appellants are taxable they must be treated in the same way as persons carrying on any other trade or business. The figures must be ascertained, first, by arriving at what all their receipts are, and then giving them credit, not for deductions, but for all sums

(1) 12 Q. B. D. 389.

which must be paid in the course of trade before the net profits are earned.

In the present case the appellant society have two classes of business—the one life assurance, and the other the sale of annuities. In the case of the first no question arises, because there is no payment of annual sums by the society. In the case of the business of selling annuities the annuitant pays a lump sum down, and in return the society pays him an annual sum during his life, which is commonly called an annuity. It is because this sum which they pay is an annual sum that it comes within the language of the Act.

The clear intention of the Income Tax Acts is to give the revenue an opportunity of taxing all taxable sums at the earliest possible occasion, as in the case of annual payments made by the Bank of England, where the deduction of the tax is clearly provided for and made compulsory by s. 89 of the Act of 1842, and by some following sections. There are also provisions dealing with other payments which are not in the nature of the payments made by the Bank of England, or by public companies, but are made in respect of some private arrangement. In these cases it is left optional, by s. 40 of the Act of 1853, to the payers to deduct the income tax before payment. The present case, no doubt, is different from either of the foregoing, and the question is whether it comes within s. 102 of the Act of 1842, which provides that "upon all annuities, yearly interest of money, or other annual payments, . . . payable either as a charge on any property of the person paying the same by virtue of any deed, will, or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract," there shall be charged the usual income tax; and further provides that "in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment." It is said that these annuities are not payable out of profits or gains. I think that they are payable out of profits or gains, for, according to the prin-

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GRESHAM LIFE ASSURANCE SOCIETY v. STYLES.

POLLOCK, B.

ciple of calculation which I have already stated, if these annuities were not payable, the lump sums received from annuitants would be wholly profits or gains. Although those lump sums may not be net profits, yet being received in consideration of the granting of annuities, they are as much gains as any sum which is received by a merchant as a payment to him for goods sold, services rendered, or in respect of any special contract. In this particular case all the lump sums are not taxed as profits or gains, but they would be taxable as such if the payment of the annuities were not made out of them and out of what they produce, and therefore the annuities are paid out of profits or gains.

It seems to me clear that the intention of the legislature as expressed in s. 102 is to do in such a case as the present the same as in other cases, and to find at its source a taxable item, and to tax it in the hands of the payer, that is, in this case, in the hands of the insurance company. Upon these grounds I think that this appeal must fail, and be dismissed with costs.

HAWKINS, J. I concur.

Appeal dismissed.

Solicitor for appellants: *R. L. Devonshire.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

W. A.

Jan. 16; *Feb.* 6.

McLARDY *v.* SLATEUM.

Practice—Order XIV.—Summons for Judgment—Application made after Delivery of Defence—Jurisdiction to make Order.

An application for leave to sign judgment under Order XIV., r. 1, need not necessarily be made before the defendant has, in the ordinary course, delivered his defence, but if the application is made after that time the plaintiff must shew circumstances which justify the delay.

MOTION on appeal from an order of Field, J., at chambers, setting aside an order of a master.

This was an action to recover a sum of 129*l.* for principal and interest. The writ was specially indorsed, and the defendant in the ordinary course delivered a defence. About a month after the defence was delivered the plaintiff applied for judgment under Order XIV., and a master made an order giving the defendant leave to defend upon paying the whole amount into court.

Upon appeal, Field, J., set aside the master's order upon the ground that an application under Order XIV. could not be made after delivery of defence.

The plaintiff appealed.

H. Reed, for the plaintiff. The order was rescinded upon the ground that there was no jurisdiction to make it because the summons had been taken out after the delivery of the defence. The learned judge stated that he had so decided very shortly after the present rules came into force. There is nothing in the wording of Order XIV., r. 1, to warrant such a construction. If that view were adopted, a defendant might always defeat the right of a plaintiff to obtain summary judgment upon a specially indorsed writ by delivering a defence as soon as he entered an appearance. A defence is often good upon the face of it which cannot stand the test of an application under Order XIV., because the defendant cannot swear to the truth of the defence he has delivered; as for instance, where he has pleaded "non est factum" to an action upon a deed. Other judges have differed from the view taken by Field, J.

W. Baugh Allen, for the defendant. Leave to sign judgment under Order XIV. cannot be given when a defence has been delivered before the issue of the summons. The effect of such an order would be to strike out the defence, which the rules of Order XIV. give no power to do. The defence as soon as delivered is upon the record. Rules 4 and 6 provide that the judge may either make an order for judgment, or permit the defendant "to defend" either upon terms or unconditionally; the leave "to defend" must be to defend by delivering a defence, and therefore those rules are inapplicable when a defence has already been delivered. This shews that the procedure under Order XIV. can only be applicable to cases where a defence has not been delivered.

In this case the plaintiff has unreasonably delayed making his application, and is on that ground also not entitled to the benefit of summary procedure.

Reed, in reply.

Cur. adv. vult.

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1890. Feb. 6. The judgment of the Court (Pollock, B., and Wills, J.) was delivered by

POLLOCK, B. This is an appeal from an order of Field, J., at chambers, setting aside an order of a master, who, upon an application under Order XIV., had given the defendant leave to defend upon paying the amount of the claim into court.

The order of Field, J., proceeded upon his view of the proper construction of Order XIV., r. 1, namely, that the plaintiff was bound to make his application for summary judgment before the defendant had put in any statement of defence.

We took time to consider our judgment, principally because we were desirous of ascertaining what was the practice followed by other judges, and by the masters, in consequence of being informed by counsel that Field, J., had long ago decided, in an unreported case, that the application must be refused if made after delivery of a statement of defence. We have made those inquiries, and learn that the view of Field, J., still is that the intention of Order XIV. was that the plaintiff must make his application before delivery of a statement of defence; but that in peculiar circumstances it may be made after, as where the defendant has delivered his defence before the expiration of the usual time, for the very purpose of defeating such an application. The view taken by other judges, and by the masters, is that the intention of Order XIV., r. 1, was that the plaintiff should apply within a reasonable time after the appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which make an application under Order XIV. right and proper. We think that this is the proper construction of the rule.

Although the primary intention of the rule may be that an application should be made before a defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory. Therefore our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under Order XIV., r. 1, because a defence has been delivered. The master was right in considering the facts and making an order, and this appeal must be allowed.

If a plaintiff makes his application after the ordinary time,

the onus is on him to shew that the delay is justifiable under the special circumstances of the case.

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Appeal allowed; case sent back to the Judge at Chambers to be heard on the merits.

Solicitors for the plaintiff: *Jaques & Co., for Heath & Sons, Manchester.*

Solicitors for the defendant: *Williamson, Hill & Co., for E. Roberts, Rhyl.*

W. A.

[IN THE COURT OF APPEAL.]

Jan. 31.

IN RE THE EAST LONDON RAILWAY COMPANY. OLIVER'S CLAIM.

Railway Company—Compensation—Land taken compulsorily or injuriously affected—Trial in Superior Court—Right to Compensation—Order for Trial by Judge of High Court—Jurisdiction—Regulation of Railways Act, 1868 (31 & 32 *Vict. c.* 119), *s.* 41.

By s. 41 of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), "whenever, in the case of any lands purchased or taken otherwise than by agreement for the purposes of any public railway, any question of compensation in respect thereof, or any question of compensation in respect of lands injuriously affected by the execution of the works of any public railway, is, under the provisions of the Lands Clauses Consolidation Act, 1845, to be settled by the verdict of a jury empannelled and summoned as in that Act mentioned, the company, or the party entitled to the compensation, may . . . apply to the judge of any one of the superior courts of Common Law, who shall, if he thinks fit, make an order for trial of the question in one of the superior Courts, upon such terms and in such manner as to him shall seem fit, &c.; . . . . and the proceedings shall be under and subject to the control and jurisdiction of the Court as in ordinary actions therein" :—

Held, that, the question to be tried under s. 41, by a judge of a superior Court with a jury, was the same as that previously tried by the sheriff with a jury, and that, consequently the judge and jury had no jurisdiction to determine the title to the compensation, but could only determine the amount.

Semble, that, notwithstanding the Judicature Acts and Rules, a trial in the High Court under s. 41 cannot be by a judge without a jury.

APPEAL by the East London Railway Company against an order made by a Divisional Court (Lord Coleridge, C.J. and Mathew, J.), setting aside an order of Grantham, J., which directed that the questions of liability and the amount of com-

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pensation (if any) involved in a claim for compensation by E. J. Oliver against the company, should be tried before a judge of the Queen's Bench Division.

The order purported to be made under s. 41 of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119).

The claimant having served a notice on the railway company under the Lands and Railways Clauses Consolidation Acts, claiming compensation for damage and injuries done by them to his premises, and in case they disputed the amount of his claim that the compensation should be settled by a jury, the company issued the summons on which Grantham, J., made the order above mentioned.

The claimant appealed to the Divisional Court, asking by his notice of motion that the order of Grantham, J., might be set aside, or in the alternative, that the order might be varied by directing that the amount of compensation to be paid by the company should be tried before a judge of the Queen's Bench Division and a jury.

The Divisional Court set aside the order on the ground that there was no jurisdiction under s. 41 to make it: (1), because, at the time when the Act of 1868 was passed, there was no powe for a judge to try any case without a jury, and that the power conferred by s. 41 had not been enlarged by subsequent legislation, and (2), that the only effect of s. 41 was to substitute a judge of the High Court and a jury for the sheriff and a jury, leaving the procedure under the Lands Clauses Consolidation Act untouched. Consequently, the question of liability to pay compensation could only be determined in a separate proceeding after the quantum of compensation had been determined by a judge and jury.

Littler, Q.C., and *J. Lawson Walton*, for the company. It is not now contended by the company that, under (1) s. 41 of the

(1) Sect. 41: "Whenever, in the case of any lands purchased or taken otherwise than by agreement for the purposes of any public railway, any question of compensation in respect thereof, or any question of compensation in respect of lands injuriously affected by the execution of the works of any public railway, is under the provisions of the Lands Clauses Consolidation Act, 1845, to be settled by the verdict of a jury empannelled and

Regulation of Railways Act, 1868, the question in dispute can be tried by a judge of the High Court without a jury. The order of Grantham, J., may be amended in that respect. But it is contended on behalf of the company, that the question of the claimant's title to compensation ought to be tried first, so that before the amount of compensation is determined it may be decided whether he is entitled to any compensation at all. The company contend that in the present case there is no right to compensation. The "question between the parties" mentioned in s. 41 must mean the whole question—the question of right to compensation as well as that of amount. The question is to be stated in "an issue to be settled in case of difference by the judge," which cannot mean a mere question of amount. In *New River Co.* v. *Midland Ry. Co.* (1) an issue was directed under s. 41 to try the right to compensation, but the point now raised does not appear to have been taken then. Sect. 41 was probably framed with a view to the practice which formerly existed in the Court of Chancery of restraining proceedings to

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nelled and summoned as in that Act mentioned, the company or the party entitled to the compensation may, at any time before the issuing by the company to the sheriff as by that Act directed, apply to the judge of any one of the superior Courts of Common Law at Westminster, who shall, if he think fit, make an order for trial of the question in one of the superior Courts upon such terms and in such manner as to him shall seem fit; and the question between the parties shall be stated in an issue to be settled in case of difference by the judge, or as he shall direct, and such issue may be entered for trial and tried accordingly in the same manner as any issue joined in an ordinary action at such place as the judge shall direct; and the proceedings in respect of such issue shall be under and subject to the control and jurisdiction of the Court as in ordinary actions therein, but so nevertheless that the jury shall, where the issue relates to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to lands held therewith, deliver their verdict separately in manner provided by the 49th section of the Lands Clauses Consolidation Act, 1845."

Sect. 43: "The verdict of the jury and judgment of the Court upon any issue authorized by this Act shall, as regards costs and every other matter incident to or consequent thereon, have the same operation and be entitled to the same effect as if that verdict and judgment had been the verdict of a jury and judgment of a sheriff upon an inquiry conducted upon a warrant to the sheriff issued by the company under the Lands Clauses Consolidation Act, 1845."

(1) 36 L. T. (N.S.) 539.

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assess compensation under the Lands Clauses Consolidation Act, until the title of the claimant should have been decided. This was done by Cottenham, L.C., in *London and North Western Ry. Co.* v. *Smith.* (1) That case cannot be treated as overruled by *East and West India Docks and Birmingham Junction Ry. Co.* v. *Gattke.* (2)

Birmingham and District Land Co. v. *London and North Western Ry. Co.* (3), upon which the Divisional Court founded their judgment, was wrongly decided, and is not binding on this Court.

Jelf, Q.C., and *W. H. Gover*, (*Frank Gover*, with them), for the claimant. It is not disputed that there was jurisdiction to order the trial by a judge of the High Court with a jury of the question, which, under the Lands Clauses Consolidation Act, would have been tried by the sheriff with a jury, that is, the amount of the compensation. But the Court has a discretion, and, now that the warrant to the sheriff has been issued, all the expense incurred will be thrown away if the question is sent to the High Court for trial. The company by their notice of appeal ask that the order of Grantham, J., may be restored. But it is contended that there was no jurisdiction to order the question to be tried by a judge without a jury. The provisions of this special Act are not repealed by the general provisions of the Rules of the Supreme Court, 1883, as to the trial of actions by a judge without a jury. The only effect of s. 41 is to enable the Court to make an order substituting a judge of the High Court with a jury for the sheriff with a jury to try the very same question, that is, the amount of compensation, which, under the Lands Clauses Consolidation Act, would have been tried by the latter. Everything else is left as it was before. To enforce payment an action must be brought on the judgment, and in that action the company can dispute the title of the claimant. Or they can dispute his title by means of a certiorari to set aside the judgment. The only question, other than the amount of the compensation, is really one of fact,—have the company's works caused the injury complained of? *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (3) was rightly decided.

Littler, Q.C., in reply.

(1) 1 Mac. & G. 216. (2) 3 Mac. & G. 155. (3) 22 Q. B. D. 435.

LORD ESHER, M.R. It appears to me that the practice or rather the law as regards this matter under the Lands Clauses Act was settled beyond all doubt at the time when the Railways Regulation Act of 1868 was passed. Under the Lands Clauses Act I think it is clear that no question could be raised, either at law or in equity, as to the title of the claimant, whose land was taken or injuriously affected by a railway company, until the amount of the compensation had been settled by means of a trial before the sheriff and a compensation jury summoned under that Act. It is clear that at that trial the title of the claimant to the land could not be questioned; it was assumed that he had a good title. It is said that at one time the Court of Chancery would have granted an injunction to restrain the proceedings before a sheriff's jury to assess compensation, until that Court had itself determined the question of the claimant's title. That seems to have been done by Lord Cottenham in *London and North Western Ry. Co.* v. *Smith.* (1) It is obvious that Lord Truro was not of the same opinion. He said, no doubt, in *East and West India Docks and Birmingham Junction Ry. Co.* v. *Gattke* (2), that he would not venture to overrule the decision of Lord Cottenham; but succeeding equity judges, and the House of Lords in *Brierley Hill Local Board* v. *Pearsall* (3), have all said that, although Lord Truro expressly said that he did not overrule the decision of Lord Cottenham, yet he practically did so. At all events, those judges and the House of Lords obviously agreed with Lord Truro's view, and disagreed with that of Lord Cottenham. So that the law as regards the Lands Clauses Act is beyond doubt.

Then the argument in the present case must be this—that s. 41 of the Regulation of Railways Act, 1868, has altered that course of procedure in any case in which the Court or a judge thinks that it ought to be altered, in other words, that, although neither a Court of Equity nor a Court of Common Law would in any way or by any proceedings try the question of title until after the question of compensation had been settled, this Act was intended to give power to the Court to say in any particular case

(1) 1 Mac. & G. 216. (2) 3 Mac. & G. 155.
(3) 9 App. Cas. 595.

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that the question of title should be decided first. Of course the legislature might have done this; but, if they intended to do it, nothing would have been easier than to say so in plain terms, about the meaning of which there could be no mistake.

Is then s. 41 so plain and so clearly expressed that no one can mistake its meaning? It is admitted that the section is the very opposite of clear, and that the meaning suggested is to be gathered (if at all) rather by manipulating the words than by construing them in the ordinary way. The whole question, I think, depends upon s. 41, and whether we can gather from it that the legislature has given the suggested power to the Court or a judge. Reading the section according to its ordinary grammatical construction, let us see what it comes to. "Whenever in the case of any lands purchased or taken otherwise than by agreement for the purposes of any public railway" (so that at any rate it can only apply to railways; it cannot apply to other bodies who have power to take land under the Lands Clauses Act) "any question" (that is the first use of the word "question"). Is it "any question of title, or of compensation"? No. It is "any question of compensation in respect thereof." That is the first enunciation of the question. "Or any question of compensation in respect of lands injuriously affected by the execution of the works of any public railway, is under the provisions of the Lands Clauses Consolidation Act, 1845, to be settled by the verdict of a jury, empannelled and summoned as in that Act mentioned." Therefore it is: "Whenever any question of compensation is under the provisions of the Lands Clauses Act to be settled by the verdict of a jury empannelled and summoned as in that Act mentioned"—that is the only question mentioned—"the company, or the party entitled to the compensation, may, at any time before the issuing by the company to the sheriff, as by that Act directed, apply to a judge of any one of the Superior Courts of Common Law at Westminster, who shall, if he think fit, make an order for trial of *the* question." Now what is "*the* question" there? "*The* question," by itself, means nothing; it is a term "in the air," but this is an ordinary mode of referring to something which has gone before. Therefore, when the section says, "make an order for trial of *the* question," the reference must be to the

question which has been mentioned before. What is that question? The question of compensation which, if it had not been for this section, would have been tried before the sheriff with a jury. Therefore you must read that sentence thus: "Make an order for trial of the question of compensation in one of the superior courts upon such terms and in such manner as to him shall seem fit." It is not material for the present purpose to determine whether that question could be tried by a judge alone, or only by a judge with a jury. If it can be tried by a judge alone, that is only because the Judicature Act has modified the procedure, and has said that any question (with some exceptions) which may be tried in the High Court, may be tried either by a judge without a jury, or by a judge with a jury. I do not think it is necessary to determine that point on the present occasion. But the words "the question," being words of reference, must mean the question of compensation, which, but for this Act, would have been tried by the sheriff with a jury. The section goes on, "and the question between the parties"—and that is the only thing upon which Mr. Littler's argument can be founded. The phrase is altered. If it had gone on, "and the question shall be stated," it would have been beyond all doubt that it meant only the question of compensation. But it goes on, "and the question between the parties." The first thing to be noticed is, that it still speaks of "the question," not of "the questions"—the singular, not the plural. No doubt the question of compensation is a "question between the parties," but, inasmuch as it says, "the question between the parties shall be stated in an issue to be settled in case of difference by the judge, or as he shall direct," it is argued that it would be absurd to say that the judge should settle an issue upon the mere question of the amount of compensation. What does that argument come to? That it is a necessary implication, from the enactment that the judge is to settle an issue, that that issue must involve the question of title as well as the question of compensation. I cannot see that there is any such necessary implication, because in settling the amount of compensation there may be distinct questions which, in order that the jury may try them properly, not mixing them up together, and giving a general answer as to the amount without

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telling the Court what they have been doing, it may be very desirable to have put in separate issues, so that the jury will be obliged to try each of them separately, and to answer each of them separately. Therefore, there is no such necessary implication, because full effect may be given to the words without it.

The words are "the question between the parties." Even supposing it possible that those words might enlarge the previous words, and shew that all the questions might be dealt with by the judge, is it not a sufficient answer to say, that that would be a very obscure mode of doing what it is suggested was intended, when it could have been done in plain words? Ought we, merely by reason of the alteration in the language from "the question" to "the question between the parties," to infer that such a great change of procedure, which might very materially affect the rights of the parties, was intended? I do not think that would be the right way to construe the section, even if it wou d bear that construction. I think that, in the expression "the question between the parties," the words "between the parties" are a mere amplification of that which has been said before. Then the section proceeds, "And the proceedings in respect of such issue shall be under and subject to the control and jurisdiction of the Court as in ordinary actions therein." Upon that the argument is, that the consequences of the judgment (that is, the execution which would follow on the judgment after the issues had been tried) is to be under the control and jurisdiction of the Court. The issuing of execution is not in ordinary cases under either the control or the jurisdiction of the Court; it is the act of the party. It is a right which the judgment of the Court has given to one of the parties, a right to issue execution. The issuing of execution is a result of the judgment; but, when once the party has a right to issue execution, the issuing of it is neither under the control nor under the jurisdiction of the Court. The only question relating to the execution which is under the jurisdiction of the Court is, whether the right of the party to issue execution has been exercised according to law; but the Court has no jurisdiction to say whether he shall or shall not issue execution, or whether he shall or shall not be delayed in his execution. The Court can no doubt stay execution, but that is not a reason for saying

that the execution is under the control or the jurisdiction of the Court. I can, therefore, see nothing in s. 41 which shews with sufficient distinctness, or indeed shews at all, that the rights of the parties under the Lands Clauses Act are to be affected in the manner suggested.

But it is said that s. 43 is in favour of that construction. [His Lordship read the section.] In my opinion s. 43 either leaves the question of the construction of s. 41 untouched, or it is against the argument which has been suggested on the part of the railway company. I rather think it shews that the verdict and judgment of the Court is to be treated in the same way in all respects as if it had been "the verdict of a jury and judgment of a sheriff" upon an inquiry under the Lands Clauses Act. That would be completely against that construction of s. 41 which is suggested as the true one.

I come, therefore, to the conclusion, agreeing with the Divisional Court, that the power given by s. 41 only enables the very same question, which could previously have been tried by a sheriff and a jury, to be tried by a judge of the superior Court with a jury of the superior Court. It, therefore, confers a peculiar jurisdiction on the judge of the High Court who is to do this, not by virtue of his general jurisdiction as a judge of the High Court, but by virtue of a peculiar jurisdiction which is to be exercised under the powers of the Lands Clauses Act as modified by the Act of 1868, and, therefore, the verdict and judgment so arrived at by the jury and the judge is not a judgment of the High Court under its general jurisdiction, but a judgment arrived at under the limited jurisdiction given by the Lands Clauses Act as modified by the Act of 1868.

That being so, no means were provided by the Act for carrying out the judgment. It is left to be carried out in the same way as the judgment of the sheriff and the verdict of the sheriff's jury would be carried out under the Lands Clauses Act, and the only mode of carrying out such a judgment is to bring an action upon it in the ordinary way in the High Court. I agree, therefore, with the Divisional Court that there was no jurisdiction to make the order which Grantham, J., made.

It is not necessary to enter upon the question of discretion;

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but I could not have overruled the discretion of the Divisional Court exercised upon the grounds on which it was exercised.

FRY, L.J. This case has been very zealously and eagerly argued, and we have been told that the question is one of great general importance. Therefore, I will add a few words, though my own opinion entirely concurs with that of the Master of the Rolls.

We are asked to restore an order of Grantham, J., directing the trial of the issue between the parties by a judge without a jury, and we are asked to do this on two grounds. It is said, first, that under that order all the questions between the litigants would be decided (not merely the amount of the compensation, but also the liability of the company) in one and the same proceeding. It is said that that course would be so convenient that we ought for that reason alone to restore the order. In the second place, it is said that there are special circumstances in the present case which ought to influence our judgment.

Now the first question, which is really the important one, turns upon the true construction of the Act of 1868. At the time when that Act was passed the course of procedure under the Lands Clauses Consolidation Act was well established. The two questions of quantum of compensation and of liability were then tried separately. The first was tried before justices, or by an arbitrator, or before the sheriff with a jury; the other was tried by means of an action brought upon the award or upon the judgment. The question of quantum was tried first, the question of liability afterwards. The Court of Chancery, which had at one time shewn an inclination to alter the course of procedure by means of an injunction, and to require that the question of liability should be tried first, leaving the question of quantum to be tried afterwards, had long withdrawn from any such interference, and the established practice had become that which I have already stated.

That being the then state of the practice, we have to consider the words of the Act of 1868. Sect. 41 states the event thus:— "Whenever, in the case of any lands purchased, or taken otherwise than by agreement, for the purposes of any public railway,

any question of compensation in respect thereof, or any question of compensation in respect of lands injuriously affected by the execution of the works of any public railway, is, under the provisions of the Lands Clauses Consolidation Act, 1845, to be settled by the verdict of a jury empannelled and summoned as in that Act mentioned." Now, what was the question of compensation which could, under the Lands Clauses Consolidation Act, be settled by the verdict of a jury? Was it the question of liability, or was it the question of quantum? It was the question of quantum only.

We start, therefore, with that as the question here, and, whenever that question is to be settled, the company or the party entitled to compensation may apply to a judge, "who shall, if he think fit, make an order for trial of"—what? "Of *the* question in one of the superior Courts, upon such terms and in such manner as to him shall seem fit."

Now what is *the* question of which he is to direct the trial? It is the same question which might have been settled by the verdict of a jury, and no other. Then the section proceeds, "and the question between the parties shall be stated in an issue to be settled in case of difference by the judge."

What then is "the question between the parties" which is there referred to? It is a question which might have been settled by the verdict of a jury under the Lands Clauses Consolidation Act. It is not "the questions between the parties," it is in the singular; only one question is referred to, and there is to be one issue settled, and then provision is made as to the manner in which the jury are to answer the particular questions put to them in regard to compensation, and those replies relate simply to the quantum of compensation. The meaning of the section appears to me perfectly plain, and I can hardly understand any real doubt arising upon it. It simply provides that the question which, before the passing of the Act might have been settled by the verdict of a jury under the direction of a sheriff, may now be settled by a jury under the direction of a judge of one of the superior courts.

Then we come to s. 43, the effect of which is, that the verdict of the jury who will be charged by the judge is placed in the

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same position as the verdict of the jury charged by the sheriff, and the judgment of the judge is placed in the same position as the judgment of the sheriff. It seems to me that no words could be plainer to shew what the real intention of the legislature was. So far, therefore, from its being clear upon the Act that the whole matter—the two questions of amount of compensation and liability—could be disposed of in one proceeding, I am clearly of opinion that only the question of quantum could be determined in that proceeding.

If the legislature had been minded to deal with a supposed inconvenience, which, if it exists at all, exists in all cases of the kind, it is extremely improbable that they would have required an application to be made in every case to a judge to remove the inconvenience. Surely, in mercy to Her Majesty's lieges, the legislature would not have put them to the necessity of making an application to a judge for such a purpose, but they would have expressly enacted that both the question of quantum and the question of liability should thereafter be in all such cases determined by one tribunal. The legislature have not, however, been minded to take that course; they have simply substituted a judge of a superior Court and a jury for the sheriff and a jury.

Then it is said that in the present case we ought in the exercise of our discretion to direct the trial of this case before a judge of the High Court. But why? I can see no reason. It does not appear to me that there is any special difficulty in the case as to evidence or otherwise which is likely to require the superior learning of a judge of the High Court. On the contrary, it appears to me that there are many strong reasons why we should not postpone the trial. [THE LORD JUSTICE then referred to the circumstances which rendered a speedy decision desirable, and continued:—]

There is one other point which I ought to notice. It is said that the order of Grantham, J., was wrong, because it ordered the trial before a judge without a jury. I do not think it is necessary for me to express any opinion upon that point now, but the present inclination of my opinion (though I reserve to myself the right to reconsider the matter if necessary hereafter)

is that the trial must be with a jury, and for this reason—this is special legislation. Sect. 41 refers to the mode in which the jury are to give their verdict, and sect. 43 legislates with regard to the effect of the verdict. I doubt (that is all I will say at present) whether that can have been altered by any subsequent general legislation.

For these reasons I entirely concur in the decision of the Divisional Court, and I think that this appeal must be dismissed.

LORD ESHER, M.R. I may say (although I decline finally to determine the question now) that the inclination of my opinion is at present the same as that of my learned brother, viz., that the question could be tried in the High Court only by a judge with a jury.

Appeal dismissed.

Solicitors: *Wilson, Bristows, & Carpmael; H. Gover & Sons.*

W. L. C.

[IN THE COURT OF APPEAL.]

Feb. 17.

DAVIS *v.* FREETHY.

Solicitor—Duties—Dealings with Client—Purchase of subject-matter of Suit—Practice—Garnishee Order—Equitable Charge—Priority—Order XLV., *r.* 1.

The plaintiff, a solicitor, was the assignee of the amount of a verdict recovered in the Mayor's Court, London, and the deed of assignment contained a covenant for further assurance of the amount of the verdict or other the sum or sums of money which might become payable in the action to the assignor. A new trial was obtained, and the present plaintiff became the solicitor in that action, which terminated in a verdict for the plaintiff for the same amount as before. The present defendant, who was a judgment creditor of the plaintiff in the action in the Mayor's Court, obtained a garnishee order attaching the amount recovered in that action. In an interpleader to determine whether the plaintiff as assignee or the defendant as garnishee was entitled to the fruits of the judgment:—

Held, that the rule that a solicitor conducting an action cannot purchase the subject-matter of the suit did not apply as the assignment preceded the employment as solicitor.

Simpson v. *Lamb* (7 E. & B. 84) approved and distinguished.

Held, also, that whether the assignment of the first verdict covered the amount of the second verdict or not, the intention of the assignment and

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covenant was to secure to the plaintiff the fruits of the litigation; that the plaintiff in that action could not deal with the amount recovered without violating the rights of his assignee; and that, therefore, the assignment took priority over the garnishee order.

APPEAL in an interpleader action from a judgment of Mathew, J. The facts, so far as they are material to the decisions noticed in this report, were as follows:—

An action, *Marks* v. *Raphael*, was tried in the Mayor's Court, London, and resulted in a verdict for Marks for 250*l*. An assignment in consideration of past debts, and a present advance was, on the next day, executed by Marks to the plaintiff of "all that the sum of 250*l*., being the amount awarded to the assignor in a certain action, *Marks* v. *Raphael*, lately pending in the Mayor's Court, London," and the deed contained a covenant by the assignor "to do every act, deed, or thing on demand for further assuring the assignee in the conveyance of the said sum of 250*l*., or other the sum or sums of money now payable, or which may hereafter become payable to the assignor as plaintiff in the aforesaid action of *Marks* v. *Raphael*." Due notice of this assignment was given to the debtor. After the execution of the assignment a new trial was ordered, and thereupon the present plaintiff became the solicitor having the conduct of the action, which was tried and resulted, as before, in a verdict for Marks for the amount of 250*l*. The present defendant had obtained judgment against Marks for a sum, with costs, amounting to 140*l*., and he applied for and obtained a garnishee order attaching the verdict in the Mayor's Court to the extent of his judgment debt, and thereupon an interpleader order was issued to try the right to the amount so attached, which had been paid into Court.

The learned judge gave judgment for the plaintiff.

The defendant appealed.

A. Cock, Q.C., and *H. Kisch*, in support of the appeal, contended that the assignment related exclusively to the amount of the first verdict, and as that was set aside the covenants for further assurance had nothing on which they could operate. The assignment ought not to be treated as valid since the relation between

the parties to it was that of solicitor and client, and the former purchased the subject-matter of the suit: *Simpson* v. *Lamb*. (1)

Jelf, Q.C., and *J. Ellis Davis*, contrà. The intention of the deed was to assign the sum recovered in the litigation. Whether the assignment carries out that intention or not the covenants bind the assignor. If there were no adverse claim, he could be compelled by the plaintiff to take the steps necessary to secure to the plaintiff the amount of the second verdict, and he could not deal with that verdict without violating the plaintiff's rights. Consequently the defendant holds the garnishee order subject to the prior claim of the plaintiff: *In re General Horticultural Company, Ex parte Whitehouse* (2); *Badeley* v. *Consolidated Bank*. (3) This case is distinguishable from *Simpson* v. *Lamb* (1), for the plaintiff was not acting as solicitor in the litigation when the assignment was made, and the fact that he subsequently held that position cannot invalidate the assignment. Further, it is open to argument in this Court that that case was wrongly decided, and that the decision, at all events since the Solicitors Act, 1881 (44 & 45 Vict. c. 44), should be different. [They referred also to *Knight* v. *Bowyer*. (4)]

A. Cock, Q.C., in reply.

Other points were raised in the arguments and referred to in the judgments, but they are immaterial for the purposes of this report.

LORD COLERIDGE, C.J. The plaintiff claims the money, which has been paid into Court, under a deed of assignment, and on behalf of the defendant a matter is suggested which, if it were well founded, might prevent the legal operation of the deed. The objection to its validity is founded on the decision in *Simpson* v. *Lamb*. (1) It is said that, inasmuch as at the time the deed came into operation the relation of solicitor and client had been established between the plaintiff the assignee and Marks the assignor, the principle of that case applies—that the purchase of the subject-matter of a suit by an attorney having the conduct of the suit is void, as against

(1) 7 E. & B. 84.
(2) 32 Ch. D. 512.
(3) 38 Ch. D. 238.
(4) 2 De G. & J. 421.

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the policy of the law. The learned judge who tried this case was of opinion that that principle was sound, but he pointed out the distinction which prevents it from applying to the present case. That distinction is that here, when the deed was made, the relation between the parties to it was not that of solicitor and client. At that time, therefore, there was nothing against the deed, and the fact that the parties entered into that relation subsequently cannot, in my opinion, make the covenant void, which up to that time was valid. This objection to the plaintiff's claim therefore fails.

But there was a further and a broader objection taken which was, that though the deed may have been valid enough and effectual at the time it was executed and with regard to the fruits of the verdict at that time ascertained, and also as to the covenant for further assurance, yet before effect was given to the covenant the rights of the garnishee had intervened to prevent the operation of the deed; so that Marks could not legally do that which he had covenanted to do, that is, assure to the present plaintiff the fruits of the verdict.

The answer to this objection is to be found in the decision of Chitty, J., in *In re General Horticultural Company, Ex parte Whitehouse* (1), who held broadly that a garnishee order binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order nisi was obtained and served. The learned judge acted on the principle stated in *Hirsch* v. *Coates* (2), decided in 1856, when choses in action could not be assigned. At that time such an assignor as Marks is in this case could only have transferred a right to an existing debt, and the Court of Common Pleas decided that a garnishee order under s. 63 of the Common Law Procedure Act, 1854, could have no operation upon debts of which the judgment debtor had already divested himself by assignment. The difference in the law as to the assignment of choses in action between 1856 and 1886 make the circumstances of the two cases different, but the principle remains the same and is applicable now to the transfer of choses in action as formerly to that of existing debts. Applying that principle here, were we to

(1) 32 Ch. D. 512. (2) 18 C. B. 757.

decide in favour of the garnishee we should be handing over to him property with which the debtor, in view of the covenant he has entered into, could not honestly deal, and, therefore, I think this ground of objection to the plaintiff's claim fails. On all the points raised on behalf of the defendant I think that the decision of Mathew, J., was right and should be supported.

LORD ESHER, M.R. This assignment is said to be an assignment to the solicitor in the action of the fruits of the litigation which he is conducting, and therefore within the decision in *Simpson* v. *Lamb*. (1) But then it is said that that case is not law, and that, at all events since the Solicitors Act, 1881, it has no effect. I think the decision was excellent law, and thoroughly satisfactory, and that the Solicitors Act, 1881, does not in the least affect it. That Act deals with the making of a fair and honest bargain as to costs, but has no bearing on the question before us. If the case comes within that decision, the assignment to the present plaintiff would have no effect. Then is there anything which takes this case out of the rule in *Simpson* v. *Lamb* (1), and makes the deed a binding agreement? I think there is a broad distinction. This covenant was made when the relation of solicitor and client did not exist, and a contract so made is not affected by that relation being subsequently entered into.

Then it is said that there was a garnishee order which prevents the operation of the deed. But that order was made after the second verdict, and therefore after the covenant was made by this deed. I think the judgment of Chitty, J., in *General Horticultural Co.* v. *Whitehouse* (2) was right, and that it is countenanced in *Badeley* v. *Consolidated Bank* (3). In this case Marks could not properly and without violation of the rights of his assignee have done anything which would defeat the covenant he had entered into, and consequently the plaintiff can rely on that covenant notwithstanding the garnishee order.

FRY, L.J. The plaintiff stands upon a deed of assignment, and the defendant upon a garnishee order. The subject-matter

(1) 7 E. & B. 84.

(2) 32 Ch. D. 512.

(3) 38 Ch. D. 238.

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of the deed is the sum of 250*l.*, described as being the amount awarded to the assignor in a certain action, *Marks* v. *Raphael*. To my mind, that deed in its operative part conveys the fruits of the second verdict, because, as it appears to me, the sum recovered in the second trial is the same 250*l.* that was recovered on the first, and I think that as between the assignor and the assignee the former cannot be heard to say that it is not so. But assuming this to be otherwise, the deed contains a covenant for further assurance in terms which cover the amount awarded at the second trial to the assignor. We have therefore to consider the effect of a garnishee order served after the execution of this deed to attach the amount of the second verdict. Such a garnishee order would bind so much as and no more than the judgment debtor could honestly deal with without interfering with the interests of third persons. In this case that could only be the verdict in the action subject to the claim of the present plaintiff as assignee. The claim of the defendant therefore to priority fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *Joseph Davis.*

Solicitors for defendant: *Beyfus & Beyfus.*

A. M.

[IN THE COURT OF APPEAL.]

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Feb. 19.

HODGSON *v.* BELL.

Practice—County Court—Power to remit Action—Judgment under Order XIV. *for part of Claim—"Payment, an admitted set-off, or otherwise," Construction of—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

By the County Courts Act, 1888, s. 65, where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 100*l.*, an order may be made for the trial of the action in a county court.

In an action of contract brought in the High Court, in which the claim indorsed on the writ, though it originally exceeded 100*l.*, had been reduced to a sum not exceeding 100*l.* by a payment made by the defendant to the plaintiff in pursuance of a judgment under Order XIV. for part of the plaintiff's claim:—

Held (reversing the decision of the Queen's Bench Division), that "payment" in s. 65 meant payment before action, and there was therefore no jurisdiction, under that section, to order the trial of the action in the county court.

APPEAL from a decision of the Queen's Bench Division (reported ante, p. 302.)

The claim indorsed on the writ of summons was 173*l.* 17*s.* 6*d.*, for money lent and interest.

The plaintiff obtained judgment for 101*l.* 14*s.* 6*d.*, under Order XIV., leave to defend as to the residue being given to the defendant on condition of his paying the above sum of 101*l.* 14*s.* 6*d.* to the plaintiff.

The defendant accordingly paid that sum to the plaintiff, who thereupon obtained from a master an order under s. 65 of the County Courts Act, 1888, for the trial of the action in a county court. Charles, J., at chambers, having referred the matter to the Court, Denman and Wills, JJ., in the Queen's Bench Division, differed in opinion, Denman, J., holding that the master had, and Wills, J., that he had not, jurisdiction to make the order. Wills, J., having withdrawn his judgment, the master's order stood.

The defendant appealed.

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Colam, for the appellant, and *T. W. Chitty*, for the respondent, argued as in the Court below.

LORD COLERIDGE, C.J. I am of opinion that this appeal must succeed, and I will state shortly my reasons. Before the passing of the County Courts Act, 1888, there were two statutory enactments with respect to the circumstances under which actions brought in the superior Courts might be transferred to the county court. (1) Each of those enactments states the elements necessary to give jurisdiction to transfer the action where there has been a reduction of the sum claimed. In each case the action must have been brought originally to recover a sum beyond the statutory jurisdiction of the county court; the cause of action must have

(1) By the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 26: "Where in any action of contract brought in a superior Court the claim indorsed on the writ does not exceed 50*l.*, or where such a claim, though it originally exceeded 50*l.*, is reduced by payment into Court, payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*, a judge of a superior Court on the application of either party, after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name."

By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 7: "Where in any action of contract brought or commenced in any of Her Majesty's superior Courts of common law, the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*, it shall be lawful for the defendant in the action within eight days from the day upon which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at chambers for a summons to the plaintiff to shew cause why such action should not be tried in the county court or one of the county courts in which the action might have been commenced; and on the hearing of such summons, the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly."

By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65: "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding one hundred pounds, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly," &c.

been within the terms of the enactment giving power to transfer, and the sum originally claimed must have been reduced in one of the prescribed ways to a sum within the jurisdiction of the county court. The County Courts Act, 1867, uses a set of words—"payment, admitted set-off, or otherwise"—which plainly apply only to a reduction of the claim by payment before action, and the Court of Appeal held that under that Act, in order to give jurisdiction to transfer, the payment must have been made before action brought: *Foster* v. *Usherwood*. (1) The County Courts Act, 1856, gives, as one of the elements which must be considered, "payment into Court," which words are absent in the Act of 1867. Payment into Court can, of course, only be after action brought, and the Court of Appeal held that under that Act the words "or otherwise," following the words "payment into Court, payment, an admitted set-off," in s. 7 of the Act of 1867, could be applied to something (other than payment into Court) done in reduction of the claim after action brought, and were not limited to payment made before action: *Gray* v. *Hopper*. (2) Those two enactments existing and being plainly consistent one with the other, and the decisions upon them existing and being plainly consistent one with the other, an Act of Parliament is now before us from which the words "payment into Court" are left out. They have been carefully and intentionally left out by the legislature having regard to the decisions upon the earlier statutes. When it is found that governing words have been omitted which, if they had been in the section, would have made the matter plain, there can be no doubt what the intention of the legislature was. We must act upon the decision of the Court of Appeal in *Foster* v. *Usherwood* (1), and say that, in the present case, the payment in reduction of the claim having been made after action, s. 65 of the County Courts Act, 1888, gives no jurisdiction to send the case for trial in the county court.

LORD ESHER, M.R. In the County Courts Act, 1856, s. 26, the words were, "payment into Court, payment, an admitted set-off,

(1) 3 Ex. D. 1. (2) 21 Q. B. D. 246.

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or otherwise." There were two of these descriptions, "payment into Court" and "payment," which meant different things. "Payment into Court" meant payment after action, and "payment" meant payment before action. Then came the County Courts Act, 1867, which left out the words "payment into Court," and used the words "payment, an admitted set-off, or otherwise." In *Foster* v. *Usherwood* (1) two reasons were given for deciding that in order to give jurisdiction, under the Act of 1867, to transfer an action to the county court, the thing done in reduction of the claim must be done before action. The first was that such words as "payment" and "set-off" clearly applied to payment and set-off before action brought; and the other was that the words "payment into Court" had been left out of the statute. The County Courts Act, 1888, is in pari materia with the Act of 1867, and s. 65 uses precisely the same words. It is a clear rule of construction that where you find a construction has been put upon words in a former Act which is in pari materia with the one under consideration, and when you find that the same words are used in the later Act as in the former, you must apply the same construction to the later Act. It is said that the words in s. 65, "at any time," shew that the legislature intended to enlarge the jurisdiction to transfer actions to the county court, and intended to give an enlarged meaning to the words "payment, an admitted set-off, or otherwise." To my mind there is nothing from which we can infer such an intention. It certainly is not a necessary implication from the language used. It is said that it would be a reasonable interpretation, because the object was to extend the jurisdiction of the county courts. I do not know whether that was, or was not, the object the legislature had in view, and I can only construe the section according to my view of the meaning of the words actually used.

FRY, L.J. I am of the same opinion. The question seems to me hardly arguable after the decision in *Foster* v. *Usherwood*. (1) There are two sections of earlier Acts of Parliament, one of which has been held to mean payment after action, and the

(1) 3 Ex. D. 1.

other has not. In the Act of 1888 the legislature has deliberately chosen the form of words used in the second Act. In my opinion the choice was made in view of the decisions upon those Acts. The appeal must be allowed.

Appeal allowed.

Solicitors for the appellant: *John Cotton & Son.*

Solicitors for the respondent: *Stocken & Jupp, for Walter A. Lomer & Son, Southampton.*

W. A.

DAVIS *v.* STEPHENSON (1).

March 14.

Gaming—Suffering House to be used in contravention of the Betting Houses Act (16 & 17 Vict. c. 119), ss. 1, 3—Use of House for the purpose of the receipt of Money by way of Betting—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 17.

By s. 17 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), any licensed person who suffers his house to be used in contravention of the Betting Houses Act (16 & 17 Vict. c. 119) is liable to a penalty. By ss. 1 and 3 of the Betting Houses Act (16 & 17 Vict. c. 119), any occupier of a house who permits it to be used by another for the purpose of any money being received by or on behalf of such person by way of betting is guilty of an offence.

The defendant, the keeper of a licensed house, allowed a person who made bets near it to deposit in the house the stakes received by him. Such stakes had been received by him outside the house.

Held, that, as the money was proved to have been received by the depositor outside and not inside the house, the defendant was not liable to be convicted for suffering the house to be used by the depositor for the purpose of money being received by him by way of betting contrary to ss. 1 and 3 of the Betting Houses Act (16 & 17 Vict. c. 119).

CASE stated by the Recorder of Birmingham on the appeal of Frederick Davis, who had been convicted at the petty sessions of having "unlawfully suffered his licensed house," the Justice Tavern in Moor Street, Birmingham, "to be used in contravention of the Betting Houses Act (16 & 17 Vict. c. 119) (2), contrary

(1) Before Lord Coleridge, C.J., and Lord Esher, M.R., sitting as a Divisional Court.

(2) By 16 & 17 Vict. c. 119, s. 1: "No house, office, room, or other place shall be opened kept or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any per-

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to the Licensing Act, 1872." (1) The persons said to have been allowed so to use the house were one Hicks and the defendant's daughter.

It appeared that on the day on which the offence was alleged to have been committed, Hicks received, partly in a passage near the house, partly on waste ground near it, a large number of packets containing money as stakes. The persons from whom he received the packets intended to back horses at Ascot races. Each packet contained besides the money a memorandum of the backer's name, the horse's name, the sum laid, and the time at which the race was to be run; the understanding being that if the horse named won, Hicks was to pay the backer the sum enclosed with the current odds against the horse at starting. For so doing Hicks was convicted of "using" the "places" in question "for betting with persons resorting thereto" in contravention of s. 1 of 16 & 17 Vict. c. 119. The packets received

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son having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance undertaking promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race fight game sport or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened kept or used for the purposes aforesaid or any of them, is hereby declared to be a common nuisance and contrary to law."

By s. 3: "Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open keep or use the same for the purposes hereinbefore mentioned or either of them; and any person who being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened kept or used by any other person for the purposes aforesaid or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened kept or used for the purposes aforesaid or either of them, shall on summary conviction be liable to a penalty."

(1) By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17: "If any licensed person opens keeps or uses or suffers his house to be opened kept or used in contravention of the Act 16 & 17 Vict. c. 119, he shall be liable to a penalty."

by Hicks were proved to have been conveyed into the house by the defendant's daughter. On the execution of a search-warrant Hicks was found at the bar among the customers; the defendant was found behind the bar with a glass containing money and a "paying-out list" relating to bets made on other days before him; and some of the papers received by Hicks on the day in question were found in a drawer in the bar. It was not proved that any of the depositors of stakes resorted to the tavern.

The recorder affirmed the conviction, subject to the case.

Hugo Young, for the defendant. The conviction cannot be supported. In order to constitute the offence of allowing a house to be used for betting purposes under s. 3 of the Betting Houses Act, the person allowed to use the house must do so either "for the purpose of" his "betting with persons resorting thereto" or "for the purpose of money being received" by him there in respect of betting under s. 1. It is not alleged that Hicks made bets with persons resorting to the tavern. If the backers of horses with whom he dealt had paid the stakes to him at the tavern or had posted them to him there, there would have been evidence of a use of the tavern by him for the receipt of money in respect of betting. But the case shews that Hicks received the stakes, not in the tavern, but outside it, in the places which he was convicted for using for betting purposes. When the packets were taken into the tavern, the bets had been made and the sections had no longer any application. [He referred to *Bows* v. *Fenwick* (1); *Reg.* v. *Cook* (2), and *Snow* v. *Hill*. (3)]

Poland, Q.C., (*W. Russell Griffiths*, with him), in support of the conviction. It is conceded that it was necessary to prove a receipt by Hicks of the stakes within the tavern. The evidence shews that Hicks deposited them there by arrangement with the defendant, who thus allowed Hicks to use the tavern as a betting office. Had the defendant allowed Hicks to stand on the steps of the tavern to receive the stakes he would clearly have been liable to be convicted.

[LORD ESHER, M.R. If, after the bets had been made, the

(1) Law Rep. 9 C. P. 339. (2) 13 Q. B. D. 377.
(3) 14 Q. B. D. 588.

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stakes had been sent by the betting man to a tavern in some distant part of Birmingham or in another town, or to a bank, it could not have been contended that the tavern keeper or the banker was liable to conviction for having taken them in.]

Here the deposit of the stakes in the tavern by the defendant's daughter on behalf of Hicks with the defendant's consent was as much a part of the betting transaction as the taking of the stakes by Hicks outside the tavern.

LORD COLERIDGE, C.J. I am of opinion that the conviction cannot be sustained. I come to this conclusion with some reluctance, because it amounts to deciding that a deliberate and scarcely disguised attempt to evade the Act has succeeded; but I do not think the Court can hold otherwise without holding that the Act applies to cases which cannot be evasions of it as they are obviously not within its purview.

It is conceded that the charge must fail unless it can be shewn that Hicks received the money in the defendant's tavern by the defendant's permission. Nothing short of this will suffice. It is plain, however, that Hicks received the money not in the defendant's tavern, but outside it. After having received the money he sent it into the tavern by a messenger by arrangement with the defendant, and there he resumed possession of it; but there is no pretence for saying that he received it in the tavern. The statute, therefore, does not reach the case, and the conviction must be quashed.

LORD ESHER, M.R. I am of the same opinion. Attempts to evade penal statutes are common, and this attempt has succeeded. The defendant is charged with having "suffered his licensed house to be used" by Hicks for the unlawful purpose of receiving money by way of betting. Hicks himself was properly convicted of thus using the passage and the waste land, because he received money by way of betting in these places, but there is no evidence to shew that the defendant suffered Hicks to use the tavern for this unlawful purpose. The money was received by Hicks not in the defendant's tavern, but outside it, in the places for using which contrary to the Act Hicks was convicted. There

was a good case under the Act against Hicks, but none against the defendant.

Conviction quashed.

Solicitors for appellant: *Sharpe, Parkers & Co., for Horton & Redford, Birmingham.*

Solicitors for respondent: *Soames, Edwards, & Jones, for C. A. Carter, Birmingham.*

H. D. W.

[IN THE COURT OF APPEAL.]

Feb. 3.

THE QUEEN ON THE PROSECUTION OF HARDING REES *v.* COWPER.

County Court — Practice — Costs — Plaint entered by Solicitor — Signature of Particulars — County Court Rules, 1889, *Order* VI., *r.* 10, *and Appendix.*

In order to entitle the plaintiff in an action in a county court to the costs of entering a plaint by a solicitor, the solicitor must sign the particulars, and a lithographed statement of the solicitor's name on the particulars is insufficient.

So held by Fry, L.J., agreeing with the judgment of the Queen's Bench Division, Lord Esher, M.R., dissenting.

APPEAL from the judgment of the Queen's Bench Division (reported ante, p. 60), discharging a rule which had been granted calling upon Fitzroy Cowper, Esq., deputy judge of the county court at Croydon, to shew cause why he should not hear and determine a question arising in an action brought in that court.

By the particulars in the action, 2*l.* 16*s.* 5*d.* was claimed for debt, 4*s.* for court fees, and 4*s.* for solicitors' costs. The particulars were drawn on a form which contained the name of the plaintiff's solicitors, lithographed. The day before the hearing the defendant paid into court 3*l.* 0*s.* 5*d.* At the hearing the registrar ruled that the plaintiff's solicitors were not entitled to an order for payment of the 4*s.* claimed as solicitors' costs, on the ground that the plaintiff's solicitors had not complied with the rules by signing the particulars. (1) The matter was

(1) By the County Court Rules, 1889, Order VI., r. 10: "The solicitor of a plaintiff suing by a solicitor shall indorse on the particulars his name or

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brought before the deputy judge, who upheld the registrar's ruling.

The prosecutor appealed.

Crump, Q.C., and *E. Lewis Thomas*, in support of the appeal. The name of the solicitor is required to authenticate the documents, and that purpose is attained by the lithographed indorsement. A signature may be stamped or printed: *Bennett* v. *Brumfitt* (1); *Schneider* v. *Norris* (2).

Jelf, Q.C., and *Muir Mackenzie*, contrà. Signing is an act to be done to the document when completed, and the necessity for a signature is not met by merely using a form on which a name is lithographed. The distinction between a signature and an indorsement is a well-known one, and occurs in other places, for instance, in the Rules under the Judicature Acts, where the indorsement of a writ is spoken of (Order IV., r. 1), and signature to pleadings (Order XIX., r. 4). Decisions as to what is a signature to satisfy the Statute of Frauds, or in the case of bills of exchange, do not assist in determining the construction of this rule.

E. Lewis Thomas, in reply.

LORD ESHER, M.R. Notwithstanding what has been said in opposition to this application, I think, in determining the case, we ought to see what was the reason for making the rule, and what it was meant to meet. It seems to me that what was intended

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firm, and place of business, and shall state thereon where he will accept service of proceedings in the action or matter on behalf of the plaintiff, otherwise the costs of entering the plaint by the solicitor shall not be allowed."

The Appendix to the Rules contains the following provision as to costs:—

"Costs to be paid to solicitors in actions and matters, as well between party and party as between solicitor and client, where the amount recovered exceeds 2*l.* and does not exceed 10*l.*

"LOWER SCALE.

"Where the particulars and copies are signed by a solicitor, and the amount claimed exceeds 2*l.* and does not exceed 5*l.*, there may be entered upon an ordinary summons and upon a default summons four shillings, unless the latter is to be served by a solicitor, when seven shillings shall be entered."

(1) Law Rep. 3 C. P. 28.

(2) 2 M. & S. 286.

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was this—that where a solicitor is employed you should have his name on the particulars, so that if there is any necessity the Court may control its officer, over whom it has jurisdiction. If that was the object, how is it affected by the objection, that the name appears in a lithograph form? I do not see how the form could be misused; but if it could that would afford no argument against its use. The misuse could be found out and punished, and, moreover, this is not the case of getting money direct from the defendant, but of going before the registrar and getting from him an order for the payment of money. The whole object of the rule seems to me to be to get the document authenticated as coming from a solicitor's office, and if the solicitor has authorized the issue of the lithograph form that object is attained. He means it to be his signature and sends it forth as his, and that seems to me sufficient compliance with the Act. I know of no case with the exception of a will in which, if a man's name is put down by him with the intent that it shall be treated as his signature, that is insufficient, because it is not in his handwriting. Then it is said that this cannot be his signature because the document was filled up after the lithographed name was placed on it. If that contention is correct it would be equally so if the signature had been in the solicitor's own handwriting, and the document would have to be treated as invalid directly it could be shewn that the signature preceded the rest of it. That is not the case under the Statute of Frauds, or in any other case that I know of. I think, therefore, that no reason has been given why this document should not be treated as signed by the solicitor, and that the appeal ought to be allowed.

FRY, L.J. I have the misfortune to differ from the Master of the Rolls, and to think that the judgment of the Divisional Court is correct.

We have to deal with certain matters of form arising out of the County Court Rules. In the first place, Order VI., r. 10, requires a solicitor acting for a plaintiff in the county court to indorse on the particulars his name and place of business, otherwise he suffers a certain loss with regard to costs. Order LI., r. 15, requires that where particulars or documents are to be filed they shall be filed with the registrar, together with as many

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copies as there are parties to be served, and the names, addresses, and descriptions of such parties, and, if required, an additional copy for the use of the judge. What happened in this case was that there was a lithograph form for particulars with the name and place of business of the solicitor at the foot, and, to my mind, it is impossible not to see that this was intended to be a compliance with Order VI., and that, although placed on the face of the particulars, they were intended to comply with the rule as to indorsement. It is, however, suggested that this lithograph of the name and address of the solicitor is a signature by him within the meaning of the words in the appendix, that where the particulars and copies are "signed by a solicitor," certain amounts may be entered for costs. I do not agree with this, for I think the signature required is intended to be something to authenticate the particulars and the accuracy of the copies, and to make the solicitor responsible for them as an officer of the Court. The advantage of this is apparent when we consider that these documents are acted on in a great number of cases in which it is not intended that any evidence should be tendered to the Court, and of this the case before us is an illustration. The registrar may fairly act on what appears at the foot of the particulars as the signature of the solicitor or firm of solicitors, while it is plain that a mere lithograph form, the blanks in which may be filled up at any time, offers no guarantee that it has come under the personal cognizance of the solicitor, or any person authorized to act on his behalf. I think, therefore, we should be defeating the rule if we held that a mere lithograph form is a sufficient signature within the rule.

I am further of opinion that the argument that this is a signature of the particulars is open to another objection—that it was not made with any intention to satisfy the provision in the appendix, but alio intuitu for the purpose of satisfying the requisition with regard to indorsement.

I agree, therefore, with the judgment of the Divisional Court, and think the appeal ought to fail.

Solicitors for plaintiff: *Aird & Hood.*

Solicitors for deputy judge: *Carter & Simpson.*

A. M.

WIEDEMAN *v.* WALPOLE. 1890 *April* 1.

Practice—Inspection—Affidavit of Documents—Document not disclosed in—Jurisdiction to order Inspection of—Order XXXI., *rr.* 17, 18.

Where a party applying for inspection of a specific document under Order XXXI., r. 18, makes an affidavit specifying such document, and stating that he believes the document to contain entries which he would be entitled to inspect, and that it is in the possession or power of the other party, the Court may order inspection of such document, notwithstanding that the other party may have previously made an affidavit of documents under r. 13 omitting to disclose such document, and concluding with the general averment that, save as therein disclosed, he has not in his possession or power "any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document or any other document whatsoever relating to the matters in question in the action."

APPEAL from an order for inspection of documents.

This was an action for breach of promise of marriage, and the plaintiff in the course of the action on October 9, 1888, made an affidavit of documents in the Form No. 8 in Appendix B. of the Rules of the Supreme Court, 1883, concluding with the general averment therein given, "According to the best of my knowledge, information, and belief, I have not now and never had in my possession, custody, or power, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document or any other document whatsoever relating to the matters in question in this action or any of them, or wherein any entry has been made relative to such matters or any of them other than and except the documents set forth in the first and second schedules hereto." Neither of such schedules disclosed any diary kept by the plaintiff. The action came on for trial before Huddleston, B., and a jury, when the verdict passed for the defendant; but subsequently on May 29, 1889, the Court of Appeal ordered a new trial to be had. On November 19, 1889, a commission was ordered to issue for the examination of witnesses on behalf of the plaintiff and the defendant at Constantinople. On February 3, 1890, a witness named Osman Pasha was being examined under the said commission on behalf of the

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plaintiff and in the plaintiff's presence, when a question arose as to the date when the plaintiff was staying at the witness's house, which the witness was unable to answer definitely. The plaintiff produced a manuscript book to which she referred, and from which she was anxious to fix the date. The defendant's counsel asked the plaintiff what book it was she held in her hand. She replied that it was a diary, that she always kept one, and had eight volumes of it. Thereupon the defendant took out a summons under Order XXXI., r. 18, for liberty to inspect the diary, and founded his application upon an affidavit setting out the above facts, and stating that it was of importance to him to prove the whereabouts and movements of the plaintiff during the period covered by the diary, and that he believed the diary had entries therein relating and relevant to the matters in question in the action. On February 26 the master made an order for inspection, and his order was subsequently affirmed by Lawrance, J. The plaintiff appealed.

Israel Davis (*Evans Austin*, with him), for the plaintiff. The master had no jurisdiction to make this order. The plaintiff's affidavit of documents in which she stated that she had no document whatsoever other than those scheduled is conclusive that she has not possession of the diary in question, unless such possession can be shewn by an admission in the pleadings or on oath in face of the Court. Here the only reference by the plaintiff to this diary was in the course of a conversation, not on oath, and therefore her admission can only be proved by a contentious affidavit; but it is a well-settled rule that a contentious affidavit in contradiction of the other party's affidavit of documents will not be allowed—see per Cotton, L.J.: *Lyell* v. *Kennedy* (1), *Morris* v. *Edwards* (2). Even where the Court is satisfied from the pleadings, or from the affidavits of the party from whom production is sought, that the affidavit of documents is insufficient, it can do no more than order a further affidavit of documents to be made: *Jones* v. *Montevideo Gas Co.* (3) This rule obtained as far back as Lord Eldon's time. In *Barnett* v. *Noble* (4), where it was

(1) 27 Ch. D., at p. 20.
(2) 23 Q. B. D. 287.
(3) 5 Q. B. D. 556.
(4) 1 Jac. & W. 227.

sought to compel a defendant to produce a deed not disclosed in his answer to the bill, an affidavit of an admission by the defendant that the deed was in his possession was disallowed. In *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), where there was a positive statement in an affidavit of documents that certain scheduled documents were not relevant to the matters in dispute in the action, the Court refused an order for production and inspection, although one member of the Court believed that in fact they were relevant. (He also referred to *Gardner* v. *Irvin.* (2))

W. Graham, for the defendant. It is conceded that an affidavit of documents is conclusive for the purposes of discovery, but it is not so for the purpose of inspection. Discovery and inspection stand on different footings. The cases which have been cited deal only with the subject of discovery. Even prior to the Common Law Procedure Act, the Common Law Courts would always grant inspection, although discovery could only be got in Chancery. And it never can have been intended by the rules under the Judicature Acts to take away that Common Law right. On the contrary, rules 17 and 18 of Order XXXI. expressly contemplate inspection being granted of documents which are not admitted either in the pleadings or in the affidavits. If the right of inspection is to be limited to the documents so admitted, it is difficult to give any meaning to the latter part of rule 18, which says that, "except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit shewing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party."

Davis, in reply. The latter portion of rule 18 may be satisfied by treating it as referring to a case in which no affidavit of documents negativing the possession of the particular document has been made; and it could not have been intended by that rule to repeal the well-established rule that an affidavit of documents when made is conclusive. If the defendant's contention is right,

(1) 2 Times L. R. 752.

(2) 4 Ex. D. 49.

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in none of the cases cited would there have been any application for discovery; but the party would have gone by a short road to inspection at once, and so have avoided the difficulty of his affidavit being contentious. Moreover, he would have avoided the necessity of having to pay a second deposit of 5*l*.

HUDDLESTON, B. I think that the order of the master and my brother Lawrance must be supported, and the appeal dismissed. To my mind it is impossible to lay down any general rules as to when inspection should be granted and when it should not, and the numerous cases which have been cited to us by Mr. Davis—cases dealing, not with the subject of inspection, but with that of discovery and interrogatories—do not appear to throw much light upon the question. All that can be said is that the allowance or refusal of inspection is in each case a matter for the discretion of the Court, though it may possibly be that, where there is an affidavit of documents which does not disclose the particular document which it is sought to inspect, the Court will in general exercise its discretion in favour of refusing the inspection. The question, therefore, which is the subject of this appeal, being a matter for the exercise of our discretion, we must look at all the facts of the case. Now, this is an action for breach of promise of marriage in the course of the proceedings in which, as far back as October, 1888, an affidavit of documents was made in which the plaintiff was advised to swear that she had not in her possession or power "any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever relating to the matters in question," other than certain documents scheduled. And it is now said on behalf of the plaintiff that those words "any other document whatsoever" must be held to include a diary. But I very much doubt that; for I am inclined to think that what she was referring to, when using those general words, were documents ejusdem generis with the particular classes of documents previously mentioned; and I am quite satisfied that if it were to turn out that she had such a diary, and she were to be prosecuted for perjury, that very contention would be raised on her behalf.

Then on February 3 last, some sixteen months or more after the making of that affidavit, in the course of the examination of a witness under the commission which had been issued by this Court, in answer to a question by the defendant's counsel as to the nature of a certain manuscript book which she had in her hand, she replied that it was a diary, that she always kept one, and had eight volumes of it. Now, there is an admission that there is in her possession a diary, a species of register in which she recorded everything that took place. Then it is contended in the interest of fairness and common sense that the defendant is entitled to look at that diary; while on the other side it is contended, in the greatest spirit of unfairness that, because some sixteen months before she swore that she had no document other than those scheduled, the defendant is not at liberty to prove her admission that she has such a document in her possession, and has therefore no right to inspect it. All I can say is that if that is the law it is monstrous.

The right of a party with reference to inspection is now governed by Order XXXI., r. 18, which provides that, "except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, such application shall be founded upon an affidavit shewing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party." But what possible meaning can be given to that provision if the contention of the plaintiff is right, and if the non-disclosure in the affidavit of documents of the document sought to be inspected precludes the applicants from making an affidavit that such document is in the possession of the other party?

VAUGHAN WILLIAMS, J. I am of the same opinion. The rules under the Judicature Acts seem intended to define the rights of litigants in respect of discovery, and also in respect of the production and inspection of documents. Now, with regard to the construction of the rules relating to discovery, the authorities have established beyond doubt that the affidavit of the party against whom discovery is sought is conclusive both as to

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his possession of documents and also as to their relevancy. But when one comes to look at rules 17 and 18, which deal with the subject of inspection, they both of them seem to contemplate the possibility of a party obtaining inspection of documents as to which the other party has made no admission whatever. It seems to me plain that rule 17 means to give any litigant a right if he chooses, not only to give notice to his opponent to produce the documents as to which he has made admissions, but also to produce documents which have not been mentioned in the affidavit of documents or in any other affidavit. Then rule 18 provides what shall be done in case the party to whom the notice is given does not comply with such notice, namely, that, in the case of documents not referred to in the pleadings, or any affidavit of such party, nor disclosed in his affidavit of documents, the party desiring inspection may make "an affidavit shewing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party." Mr. Davis endeavoured to reconcile that provision with his contention by suggesting that it was meant to apply only to cases where the party against whom inspection is sought has made no affidavit negativing the possession of such documents, but that where he has by his affidavit of documents already negatived the possession of such documents his affidavit is conclusive. And I am very far from saying that that is not a possible meaning of the rule. But on the whole I incline to the view that that is not the meaning which was intended. I think it is much more convenient that rule 18 should be construed as applying to every case in which the party desiring inspection is able to state of his own knowledge that the other party is in possession of documents and that they are relevant. To my mind the proper course is to entertain the application upon an affidavit by the applicant as to the other side's possession of the documents, and as to their relevancy, and then to allow the other party to make an affidavit in answer. I may say for myself, although the question does not arise here, that, in my judgment, if the other party does make such an affidavit in answer, his affidavit, when made, is conclusive, in the same way as his affidavit of documents is conclusive on the subject of dis-

covery. But in this case the plaintiff has made no such affidavit. I may admit that I cannot recollect a single instance in which such an order has been made as that which is asked for here to-day; but I think that on the true construction of the rules there is jurisdiction to make it, and I can see no reason in this case for not making it. The appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Atkinson & Dresser.*
Solicitors for defendant: *Wakeford, May, & Woulfe.*

J. F. C.

BLANKENSTEIN *v.* ROBERTSON.

Jan. 31; *Feb.* 1.

Bill of Sale—Validity—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43)—*Deviation from Form in Schedule—Lump Sum charged by way of Interest—Omission of Descriptions and Addresses of Attesting Witnesses.*

A bill of sale purported to assign the chattels specified in the schedule as security for the payment of a loan of 50*l.* "and interest thereon at the rate of 17*l.* 10*s.* for three years," the grantor covenanting to pay the grantee "the principal sum together with the interest then due in thirty-six equal monthly instalments of 1*l.* 17*s.* 6*d.*," commencing from the date of the instrument. The addresses and descriptions of the attesting witnesses were not stated in the bill of sale, but were stated in the affidavit filed with the registrar under s. 10 of 41 & 42 Vict. c. 31:—

Held, that the bill of sale was not in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), on the grounds, first, that it did not specify any rate of interest as chargeable for the loan; secondly, that it did not state the addresses and descriptions of the attesting witnesses, and that it was therefore void.

Myers v. *Elliot* (16 Q. B. D. 526) followed. *Thorpe* v. *Cregeen* (55 L. J. Q. B. D. 80) and *Wilson* v. *Kirkwood* (48 L. T. 821) disapproved.

MOTION to enter judgment for the defendant, in an action brought by the plaintiff as grantee of a bill of sale to recover a piano, one of the chattels specified in the schedule, from the defendant, to whom it had been pledged by the grantor, at a time when payments were due by him to the grantee under the terms of the instrument.

The bill of sale purported, in consideration of 4*l.* 3*s.* already owing by the grantor to the grantee, and a further advance of

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45*l.* 17*s.* by the grantee to the grantor, to convey the chattels specified in the schedule to the grantee as security for the payment of 50*l.*, "and interest thereon at the rate of 17*l.* 10*s.* for three years," and the grantor covenanted to pay the grantee "the principal sum together with the interest then due in thirty-six equal monthly instalments of 1*l.* 17*s.* 6*d.*," commencing from the date of the bill of sale. The addresses and descriptions of the attesting witnesses were not stated in the bill of sale though they were stated in the affidavit filed with the registrar under s. 10 of 41 & 42 Vict. c. 31.

It was contended for the defendant that the bill of sale was void on the ground that it was in two respects not in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, viz., first, as regards the stipulation relating to the payment of "interest," and, secondly, as regards the omission of the addresses and descriptions of the attesting witnesses. Charles, J., held that both objections failed, the former as being inconsistent with the decision of the Queen's Bench Division in *Thorpe* v. *Cregeen* (1), and directed the jury to find a verdict for the plaintiff.

J. F. Clerk, for the defendant. The defendant is entitled to judgment. The bill of sale is void on both the grounds taken at the trial.

In the statutory form the mortgage is expressed to be "by way of security for the payment of the sum of *l.* and interest thereon at the rate of per centum per annum (or whatever else may be the rate)." This shews that the rate of interest payable for the loan is intended to be stated in plain terms on the face of a bill of sale. Here the so-called "interest" is a lump sum which is to be repaid with the amount of the loan in thirty-six equal monthly instalments. This lump sum is in no sense "interest." The amount payable as part of the thirty-sixth instalment is largely in excess of that payable as part of the first instalment. If any constant rate is charged, it can only be discovered by an abstruse algebraical calculation. It is true that a bill of sale containing a similar departure from the form was

(1) 55 L. J. (Q.B.D.) 80.

held to be valid by a Divisional Court in *Thorpe* v. *Cregeen* (1) but that decision was practically overruled by the Court of Appeal in *Myers* v. *Elliot.* (2) The terms of the form, "add witness's address and description," are equivalent to a statutory direction, and of themselves shew that the statement of these particulars is material.

McCall, for the plaintiff. The bill of sale is not void according to the construction put upon s. 9 of the Bills of Sale Act, 1882, by the Court of Appeal in *Ex parte Stanford, In re Barber.* (3) The statement as to interest is a mere immaterial departure from the letter of the statutory form. The omission of the addresses and descriptions of the attesting witnesses is also immaterial, as these particulars are stated in the affidavit filed with the registrar.

[He referred to *Watkins* v. *Evans.* (4)]

DENMAN, J. With all respect to my brother Charles, I do not think that this decision can be supported. It seems to me that both the objections taken by the defendant to this bill of sale are valid.

The statutory form ends with a parenthesis in which are the words "add witness's name, address, and description." I cannot doubt that this parenthesis has been inserted with the express object of making these particulars a material part of a bill of sale. In former times the deed could not have been proved without calling one of the attesting witnesses, and the publication of their addresses and descriptions is still useful, as it provides the readiest means of access to them. The cases referred to on behalf of the defendant, as to the degree of variance from the statutory form which is permitted, have reference to the operative part of the form, not to the attestation clause. It does not appear that any case has ever decided either that proper attestation is not essential to the validity of a bill of sale, or that, where the attestation is defective, reference may be made to the affidavit for the purpose of curing the defect. I think, therefore, that the bill of sale is invalid owing to this omission.

(1) 55 L. J. (Q.B.D.) 80.
(2) 16 Q. B. D. 526.
(3) 17 Q. B. D. 259.
(4) 18 Q. B. D. 386.

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Denman, J.

The question as to "interest" is more difficult. The decision of my brother Chitty in *Wilson* v. *Kirkwood* (1) is in favour of the plaintiff's contention, and no doubt there is something plausible in the argument that, in order to avoid a nice calculation as to the rate of interest charged on a loan payable by instalments, a bill of sale may state a lump sum as payable for the loan without contravening the statute. But, as it appears to me, the strong expression of opinion given by the Court of Appeal in *Myers* v. *Elliot* (2) renders this argument no longer of any avail, and amounts to a decision that a rate of interest must be specified in a bill of sale in order to satisfy the requirements of the statute. Here, I think, it is impossible to say that any real rate of interest is specified in the bill of sale. The result is that the bill of sale is invalid on this ground also. Judgment must, therefore, be entered for the defendant.

WILLS, J. I am of the same opinion. Had there been no authority to the contrary, I should have thought that it followed from the terms of the statutory form that the rate of interest to be charged for the loan was intended to be specified either expressly or by implication in a bill of sale, and that, therefore, if no definite rate of interest was stated, and none could be calculated from the provisions of the instrument, there would be a departure from the legal effect of the statutory form such as to render the bill of sale void. In this case the bill of sale professes to charge interest eo nomine, and distinguishes between the sum to be paid in respect of this so-called interest and the capital of the loan. But no rate of interest, in the ordinary sense of the term, is stated in the instrument; none, as the attempt, if made, will shew, can be calculated from the figures which it contains; and it was well observed in argument that if the attention of the borrower had been drawn to the fact that the thirty-sixth instalment payable by him under the bill of sale would consist in an overwhelming proportion of this so-called interest, he might have been apt to go to another lender to see if he could not get better terms. In the absence of authority, therefore, I should have been prepared to hold that the bill of sale was void on this ground.

(1) 48 L. T. 821. (2) 16 Q. B. D. 526.

To come to the decisions, *Thorpe* v. *Cregeen* (1) and *Wilson* v. *Kirkwood* (2), are cases of bills of sale which were held valid, in one case by a Court of this Division, in the other by my brother Chitty, notwithstanding that they contained clauses with respect to the payment of interest very similar in their effect to this clause. But there is the more recent case of *Myers* v. *Elliot* (3), in the Court of Appeal, in which, though the point was not actually raised, the Court expressed a very strong opinion that a specified rate of interest was essential. I cannot after this strong expression of opinion by the Court of Appeal (3) regard *Thorpe* v. *Cregeen* (1) and *Wilson* v. *Kirkwood* (2) as any longer of authority. It is to be observed that in *Wilson* v. *Kirkwood* (2) the ground of the judgment of my brother Chitty was simply that a rate of interest could be calculated from what appeared in the bill of sale. That this is not so in the present case I can say with confidence, because I have myself attempted the algebraical calculation and found that it results in the necessity of solving an equation of the thirty-sixth degree—a feat which no mathematics yet known can accomplish. I am by no means surprised, however, that my brother Charles should have followed *Thorpe* v. *Cregeen* (1), which was an express decision of a Divisional Court on the point raised before him. Here, I think, we are bound to give effect to the view taken of the matter by the Court of Appeal in *Myers* v. *Elliot*. (3)

As to the other question, I am of opinion that the bill of sale is also invalid owing to the omission of the addresses and descriptions of the attesting witnesses. They are plainly, as it appears to me, a material part of the form. My brother Charles seems to have disposed of the objection by applying the rule laid down by the Court of Appeal as to substantial compliance and identity of legal effect. The construction and legal effect of a deed are no doubt the same, whether or not its execution has been attested. That rule, however, as it seems to me, can only refer to the operative part of a bill of sale. As to the practical advantage of the addresses and descriptions of the attesting witnesses being stated, I agree with my brother Denman. On both grounds,

(1) 55 L. J. (Q.B.D.) 80. (2) 48 L. T. 821.

(3) 16 Q. B. D. 526.

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therefore, the bill of sale is invalid, and the defendant is entitled to judgment.

Judgment for defendant.

Solicitor for the plaintiff: *J. Curtis.*

Solicitors for the defendant: *J. & C. Attenborough.*

H. D. W.

Jan. 20.

H. R. H. THE NIZAM STATE RAILWAY CO. *v.* WYATT.

Revenue—Income Tax—Annuity—Application of Balance to Repayment—Income—16 & 17 *Vict. c.* 34, *Sched. D.*

By an agreement between the Government of the Nizam of Hyderabad and an English company incorporated for the purpose of constructing a railway through his dominions, the Government agreed to pay for twenty years to the company in London an annuity equal to 5 per cent. per annum on the issued capital, the company being bound by the agreement to apply the annuity in payment of interest at 5*l.* per cent. per annum on the share capital paid up, and of interest at 4*l.* per cent. per annum on the debentures of the company, and to pay over the balance, viz., 1*l.* per cent., to trustees, to form a sinking fund for the redemption of the debenture capital. The company duly received the annuity and paid over such balance accordingly. They claimed to deduct the balance from an assessment on them to the income-tax under 16 & 17 Vict. c. 34, Sched. D:—

Held, that they were liable to be assessed to the income tax in respect of the whole amount of the annuity received by them, and were not entitled to any deduction in respect of the balance applied to the purposes of the sinking fund.

CASE stated by the Commissioners for the Income Tax under 43 & 44 Vict. c. 19, s. 59, on appeal against an assessment under Sched. D of 16 & 17 Vict. c. 34.

The appellant company was incorporated for the purpose of making and carrying into effect an agreement with the Government of the Nizam, sovereign of the Hyderabad State (herein, for brevity, called the Nizam), for the acquisition, extension, and working by the company of a certain railway in India.

The company was incorporated under the Companies Acts, with articles of association, on December 24, 1883, and on the 27th the agreement contemplated by the memorandum of association was entered into. Such agreement was made between the Government of the Nizam and the company. The terms and conditions of both the agreement and the memorandum and

articles of association were prepared, settled, and agreed to contemporaneously.

The memorandum and articles of association provided that the capital of the company should be 2,000,000*l.* divided into 100,000 shares of 20*l.* each, while the agreement (art. 22) stipulated for the issue by the company of 2,000,000*l.* share capital and 2,500,000*l.* debenture capital, the latter to bear interest at 4 per cent. per annum.

By art. 25 of the agreement the Government of the Nizam agreed for the period of twenty years to pay to the company an annuity equal to 5*l.* per cent. per annum on the issued capital of the company, both share and debenture, not exceeding 4,500,000*l.*, the company being bound to apply the same in payment of interest at 5 per cent. per annum on the paid-up share capital, in payment of the debenture interest at 4 per cent., and in providing a sinking fund for the reduction or redemption of capital as in the agreement and in the next paragraph hereof is mentioned.

Article 47 of the agreement provided that the balance of the annuity to be paid by the Government of the Nizam to the company pursuant to art. 25 of the agreement should be paid over to certain trustees to be invested, and the accruing interest and dividends thereof in trust to be accumulated and form a sinking fund for the redemption of debenture capital as in the article mentioned. This balance consisted of a portion, being 1*l.* per cent., of the annuity of 5*l.* per cent. paid by the Government of the Nizam under art. 25 of the agreement on the issued debenture capital of the company, which remained after payment of the debenture interest of 4 per cent., and was the amount in respect of which the company alleged that no income tax was payable.

The net earnings of the company from the working of the line had not as yet in any year amounted to the sum paid by the Government of the Nizam under the before-mentioned guarantee, and under such circumstances such net earnings were, in pursuance of arts. 26 and 31 of the agreement, paid to the Government of the Nizam in part satisfaction of the sums paid by him under the guarantee.

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The company had, since the agreement, worked the railway thereunder, and had, up to April 1, 1886, issued debentures to the amount of 241,600*l.*, which were a charge upon the company's undertaking, revenue, and property.

In accordance with the terms of the agreement between the Nizam and the company the sum of 110,448*l.*, equal to 5 per cent. on the capital of the company, upon which an assessment to the income tax had been made, had been paid by the Nizam to the company under art. 25 of the agreement, and the balance of 1*l.* per cent. on the amount of the debentures after the payment of the debenture interest by the said company as above mentioned (amounting to the sum of 2416*l.*) had by the terms of the agreement been paid over by the company to trustees for investment in conformity with the provisions therein contained.

It was contended by the company that they were entitled by way of deduction to have the assessment reduced by the above-mentioned sum of 2416*l.*, by reason that the application thereof to the sinking fund was the condition of its payment to the company by the Government of the Nizam, and that thereby, and generally under the circumstances disclosed by the agreement and articles of association the company became mere trustees thereof for the purpose of applying the same to such fund, and that the sum was not gain, income, or profit of the company within the meaning of the Income Tax Acts, but was in fact the moneys of the Government of the Nizam paid by him to the company for the purpose of being applied as mentioned.

The commissioners were of opinion that the company were not entitled to the said deduction, and confirmed the assessment.

Kennedy, Q.C. (*J. Lawson Walton*, with him), for the appellants. The balance of the annuity paid by the Nizam is not taxable as income in the hands of the appellants. First, they cannot use it, but must hand it over to trustees. Secondly, it is to be carried by the trustees to a capital account. Thirdly, on the terms of the deed it is a loan to be repaid immediately. By art. 25 the company are to apply the balance in providing a sinking fund for redemption or reduction of capital in accordance with a provision in art. 47, that the balance after each half-yearly payment

"shall be immediately paid over by the company" to trustees, one to be appointed by the Nizam and one by the company, who shall invest it and hold the stock and dividends in trust to accumulate and to form a sinking fund for the redemption of the debenture capital. By art. 26 the company shall repay all moneys paid by the Nizam in respect of the annuity, and by art. 31 the net earnings of every half year shall be applied in the first instance in or towards repayment of the portion of the annuity which shall have been paid in respect of the same half year. Although called an "annuity" the balance is not within the meaning of the Income Tax Acts.

In *Foley* v. *Fletcher* (1) half-yearly payments of instalments of the purchase-money for an estate were held not to be an annuity or annual payment liable to duty. Pollock, C.B., said that the Act applies to "profits," and not upon the return of capital. The Crown will rely on *Blake* v. *Imperial Brazilian Railway* (2), decided by the Court of Appeal. In that case a company undertook to construct a railway in Brazil under a government guarantee of 7 per cent. It raised capital by debentures at 5½ per cent., and devoted the 7 per cent. to payment of debenture interest, and to the formation of a sinking fund to pay off the debentures. The Court held that the whole sum paid under the guarantee was chargeable to the income tax. In that case the railway company was not bound to apply the balance to a sinking fund, and it was income only, and Day, J., in the Court below said (3), "If it was received by the company upon a mere trust to apply it in discharge of a capital debt, other considerations would arise." That is the present case, for the money of the Nizam only comes to the company impressed with a trust, and they are bound to apply it in discharge of a capital debt, and it is in no sense income. In the Court of Appeal, Brett, M.R., said that he agreed with everything Day, J., had said. Further, in *Blake* v. *Imperial Brazilian Railway* (2) there was no binding obligation for repayment, no promise to repay, and no provision for payment of interest, as there is in the present case. Lastly, the sum in question is merely a loan, which is, of course, not taxable.

(1) 3 H. & N. 769; 28 L. J. (Ex.) 100.

(2) Reports of Tax Cases, Part 27, p. 58. (3) Unreported.

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Sir R. E. Webster, A.G. (*Dicey*, with him), for the respondent, were not called upon to argue.

POLLOCK, B. This is an appeal from the decision of Commissioners of Income Tax, who have declined to allow a deduction which is claimed on these facts:—The Nizam wished to have a railway made in his dominions, and an English company being formed for the purpose of obtaining capital and making and maintaining the railway, an agreement was entered into between the Government of the Nizam and the representatives of the company, which provided for the assistance of the Nizam to the company by advancing sums of money under certain circumstances to find capital for the works. By art. 25, "the Government will for a period of twenty years pay to the company, in London, in sterling, by half-yearly payments, on every 1st day of January and 1st day of July, an annuity equal to 5*l.* per cent. per annum on all or any such sum or sums not in the whole exceeding 4,500,000*l.* as shall, for the time being, have been issued in shares and debentures by the company and paid into its bankers, or credited by the company as paid up; and the company shall apply the said annuity in payment of interest at 5*l.* per cent. per annum on the share capital for the time being paid up, or credited as paid up, and in payment of interest upon the debenture capital for the time being, such payment of interest on share and debenture capital being limited to the capital mentioned in art. 22, and in providing a sinking fund for redemption or reduction of capital in accordance with the provision in that behalf hereinafter contained. The said period of twenty years shall commence to run and be reckoned upon and in respect of each individual sum from the time when the same shall have been issued and paid into such bank or credited as paid up as aforesaid." I agree that the mere use of the word "annuity" cannot be taken as governing our decision of this question. We must see what that sum of money paid annually and called an annuity really is. The clause prescribes how the annuity is to be applied, and art. 26 provides that the company "shall repay all moneys paid by the Government in respect of the said annuity." This, of course, is important on the best point

in favour of the appellant; but the words "the company shall repay all moneys" do not mean that a debt is created in respect of the annuity that was received from year to year; art. 26 and the others carrying it out are provisions whereby, if a certain amount of net profits is gained by the company, it shall be applied in repayment of this loan. That is in no sense a contract for repayment of the loan as if it was a mere loan to be repaid at any fixed period, or in respect of which the company or any of its members would be liable out of funds other than those net profits. It is an ordinary provision whereby a company, which must of course commence its operations with borrowed capital, is, after a certain time, to repay capital advanced in the first instance.

I proceed to ascertain how this money is to be applied. By art. 47, "The balance of the annuity to be paid by the Government to the company in pursuance of art. 25 . . . . shall be immediately paid over by the company to the trustees mentioned in art. 46. The said trustees shall, during the period of twenty years mentioned in art. 25, invest all moneys received by them in respect of such balance of the said annuity in manner mentioned in art. 46, par. (A), and shall hold the stocks, funds, and securities in which the said moneys shall be invested, and the accruing interest and dividends thereof, in trust to be accumulated and to form a sinking fund for the redemption of debenture capital; and after the expiration of the said period of twenty years shall apply the said sinking fund, or any part or parts thereof, in the redemption of any debenture capital of the company, in such manner and at such times as shall be requisite having regard to the terms of issue of such debenture capital, and subject thereto in such manner and at such times as the Government and the company shall agree." It is not a mere loan, but a financial arrangement not uncommon with railway companies, and also in private affairs, where advances have been made by annual payments and part is set aside to form a sinking fund. During the twenty years the company have, for all purposes of the Income Tax Act, financially the same benefit from that portion of the annuity which is placed in the sinking fund as they have in respect of that portion which is applied for payment of interest on share capital or debentures. In either

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case, the security is held forth to the public, and the public subscribe money thereupon. The company is started with funds wherewith they can commence their works, and it is, I think, impossible by dissecting the fund into three portions—one for works, one for interest on the share and debenture capital, and one for repayment of money borrowed—to make one amount differ in character from the other.

The facts seem almost the same as in *Blake* v. *Brazilian Railway*. (1) I entirely agree with what was said in that case by my brother Day, that such money was in every sense income: "It is true it is not spent by the company themselves or divided amongst their shareholders, simply as interest or otherwise. When once the thing is ascertained as being subject to income tax, it matters not what is done with it afterwards; when once that comes within the grasp of the Income Tax Acts it is liable to income tax whatever may be its destination or whatever use it may be put to. . . ." That was approved of in the Court of Appeal, and seems to me to be a sound ground of decision. But it has been said with some force that this is not exactly the same case, because in *Blake's Case* (1) it was no part of the original agreement that any part of the money should necessarily be paid into a sinking fund, and the money, therefore, was not earmarked in its inception as money which must be applied to a sinking fund. But that is not the ground of the decision in *Blake* v. *Brazilian Railway* (1), nor, to my mind, does it make any difference whether provisions such as those now in question are part of the original agreement or not. It seems to me that not merely the language used, but the nature of the decision in *Blake* v. *Brazilian Railway* (1), is equally applicable; the question being—not the ultimate application of this money, but—whether at the time when it is paid over by the Nizam to the company it is an "annuity"—to use the word which is perhaps not the best that might have been chosen—a "profit" in the shape of an annuity of which the company get the benefit although they do not expend the money immediately for the purpose of constructing the line or paying a dividend. To my mind it is exactly the same thing, and as much a profit and an

(1) Reports of Tax Cases, Part 27, p. 58.

annuity to them whether they expend it or carry it to the sinking fund. Practically, we are bound by the decision in *Blake* v. *Brazilian Railway* (1), although I have thought it right to shew how, in my view, this case comes within the same kind of reasoning; and, therefore, even apart from what I have said, we must hold that this appeal cannot be allowed.

HAWKINS, J. I am of the same opinion. I think that we are bound by the decision in *Blake* v. *Brazilian Railway*. (1) The position of the company appears from a few articles in the agreement. [The learned judge read arts. 22, 25, and 47.]

The meaning of those clauses taken together is this: The company have not themselves the means of affording any security to persons proposing to take shares or to lend money. Capital is necessary for the construction and other purposes of the railway. That capital can only be got by raising money on shares or debentures. Few persons would be willing to supply the money unless they have security, at all events for the payment of interest. The Nizam is desirous of having a railway made through his territory, and to give that security says, "I will enter into an arrangement that I will pay interest at the rate of 5*l.* per cent. on the whole of the paid-up capital, according to art. 22; although as regards debentures only 4 per cent. is to be paid by you to the debenture-holders. That will leave 1*l.* per cent. interest in the hands of the company, which is to be devoted to a sinking fund for payment off, at the expiration of twenty years, of so much of the debenture capital as the money subscribed or put into the sinking fund year by year, with the accumulation by way of interest or otherwise, shall amount to." But still the company, if working, may put by money towards a sinking fund, and if they do that out of their profits that would be a fair and legitimate appropriation of the income earned by the working of the railway. But why should it not be a legitimate appropriation of the money if it comes out of the actual income supplied when there is no working of the railway? What is the object of the Nizam in subscribing his 5 per cent. upon the whole paid-up capital, but to give the

(1) Reports of Tax Cases, Part 27, p. 58.

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company an income? It seems to me that the application of the money has not very much to do with the matter. The money paid by the Nizam is paid as income, and in the company's hands it is income, which they are bound to apply, no doubt, in payment of their just liabilities to shareholders and debenture-holders, and to a sinking fund. But it is income prepaid, which has to be applied and appropriated in the interests of the company. I cannot regard it as other than as income supplied by the Nizam under his contract, and when it comes into the hands of the company it is, I think, in the same condition as income earned, subject only to this difference, that it does not rest with the directors to decide whether a sinking fund shall be created or not, but there is an obligation on them to create a sinking fund imposed by the contract under which the income is supplied.

I think *Blake's Case* (1) absolutely governs this case, and that the appeal should be dismissed with costs.

Judgment for respondent.

Solicitors for appellants: *Bircham & Co.*
Solicitor for respondent: *The Solicitor of Inland Revenue.*

J. R.

(1) Reports of Tax Cases, Part 27, p. 58.

ATTORNEY-GENERAL *v.* THEOBALD. 1890 *Jan.* 22.

Revenue—Duties on Personal Property—Voluntary Settlement—Retrospective operation of Statute—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict.* c. 12), s. 38—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict.* c. 7), s. 11.

The Customs and Inland Revenue Act, 1881, by s. 38 (*c*), imposes stamp duty upon personal property "passing under any past or future voluntary settlement" if a life interest is reserved to the settlor.

The Customs and Inland Revenue Act, 1889, s. 11, enacts that the above section "is hereby amended as follows: the description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust . . . in favour of a volunteer . . . and whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person."

Upon demurrer to an information for stamp duty alleged to be due, under s. 38 of the Customs and Inland Revenue Act, 1881, in respect of personal property to which certain persons became entitled in 1885, under a settlement:—

Held, that the provisions of s. 11 of the Act of 1889 were retrospective, and that the construction provided by that section must be applied to the description of the property sought to be taxed, and this although the property passed to the beneficiaries, and the proceedings to recover the duty were taken, before the second Act came into force.

INFORMATION by the Attorney-General to recover account stamp duty, under s. 38 (*c*) of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12).

By a settlement dated the 6th August, 1873, and made upon the marriage of John Skelton and E. L. Theobald, certain personal property of E. L. Theobald was settled upon trust for her for life, with ultimate trusts for her next of kin. In the events which happened the trusts in favour of the next of kin took effect, and in 1885 they became entitled in possession to a sum exceeding 7000*l.*

The Commissioners of Inland Revenue claimed that those trust funds became liable to be included in an account chargeable with stamp duty under s. 38 (*c*) of the Customs and Inland Revenue Act, 1881 (1), and demanded payment thereof. The

(1) 44 & 45 Vict. c. 12, s. 38, provides that stamp duties shall be charged upon accounts of personal property including sub-s. 2 (*c*) "Any property passing under any past or future voluntary settlement . . . by

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defendants, who were the trustees of the settlement, refused to pay the stamp duty claimed on the ground that the settlement was one made in consideration of marriage, and therefore was not a voluntary settlement within the above section, and upon that ground demurred to the information.

The pleadings were closed, and the case was ready for argument, before the passing of the Customs and Inland Revenue Act, 1889 (1), amending the Act of 1881, which came into operation on May 31, 1889.

Henn Collins, Q.C., and *Levett*, for the defendants, in support of the demurrer. Sect. 38, sub-s. 2 (*c*) of the Customs and Inland Revenue Act, 1881 has no application to a marriage settlement, which has always been held to be made upon good consideration. Such a settlement is not "voluntary" within the meaning of the Act, though the persons who ultimately take under it may be volunteers. The purview of the Act was fully considered in *Crossman* v. *The Queen* (2), and the true principle to be followed in construing it was laid down in the judgment of Hawkins, J. (at page 262). The Act only aims at those settlements which are made so as to evade the payment of probate and legacy duty, and which are really and substantially voluntary.

The legislature has treated the Act as bearing the meaning contended for by enacting the amendment provided by the Act of 1889.

Sir E. Clarke, S.G. (*A. V. Dicey*, with him), for the Crown. The decision of this case must be governed by s. 11, sub-s. 1, of the Act of 1889. This Act is not an amending Act, which alters the provisions of s. 38, sub-s. 2 (*c*) of the Act of 1881, in respect of the matters in dispute in this case, but is only

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deed or other instrument not taking effect as a will whereby an interest in such property for life . . . is reserved to the settlor."

(1) 52 & 53 Vict. c. 7, s. 11, enacts that sub-s. 2 of the above section "is hereby amended as follows:—The description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust . . . in favour of a volunteer, and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person."

(2) 18 Q. B. D. 256.

declaratory of the construction which must be placed upon those provisions whenever they come to be construed after May 31, 1889, the date of the passing of the Act. That is the true effect of the Act of 1889, and its provisions must be applied in construing the Act of 1881 as affecting this case: *Attorney-General* v. *Hertford*. (1) It matters not, as appears from that case, that this dispute had arisen, and proceedings had been commenced before the passing of the later Act. The language of the Act is general, and not limited to cases arising since the passing of the Act.

Levett, in reply. The Act of 1889 is not a declaratory but an amending Act; s. 11 provides in express words that sub-s. 2 of s. 38 of the Act of 1881 "is hereby amended as follows." The provisions of sub-s. 2 of s. 11, as to return of stamp duty, also shew that the section was not intended to be retrospective; they are not to take effect except in relation to accounts delivered after the passing of the Act.

The Act was not passed at the date of this information, or even at the date when it was ready for hearing, and therefore the Act must not be construed so as to alter rights which existed in the litigation commenced before the passing of the Act: *Hough* v. *Windus*. (2)

POLLOCK, B. This is no doubt a case of considerable importance, and the Court ought carefully to consider any case of this nature so as not to infringe any of the rules laid down in *Hough* v. *Windus*. (2) Each case must, however, depend upon the language of the particular statute, and, to some extent, on the subject-matter to which the statute applies. *Hough* v. *Windus* (2) is different from the present case, because there the repealing section (s. 169 of the Bankruptcy Act, 1883) provided that the repeal should not affect any right acquired under any enactment thereby repealed, and any writ which could have been issued under the repealed Acts was a right acquired.

The case of *Attorney-General* v. *Hertford* (1), in the Court of Exchequer, is a strong authority that, if an Act is in its nature a declaratory Act, the argument that it must not be construed so as

(1) 3 Ex. 670. (2) 12 Q. B. D. 224.

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to take away previous rights is not applicable. The present case is, in my opinion, a stronger one in favour of the Crown. Here the earlier Act of 1881 provides what documents are to be stamped and what property is to be affected, describing it as "any property passing under any past or future voluntary settlement." These words "voluntary settlement" having given rise to doubts, the legislature in 1889 passed an Act which, in s. 11, sub-s. 1, provides that "sub-s. 2 of s. 38 of the Act of 1881 is hereby amended as follows." Now, although that section begins by using the words "is hereby amended," yet the material part is that which follows, in sub-s. 1, "the description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust . . . in favour of a volunteer . . . whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person." Therefore the earlier Act must be read as having the meaning declared by the later Act. That seems to me to make this case perfectly clear. Then, do the provisions of sub-s. 2 of s. 11 make this construction a wrong one? The words are "a return of stamp duty shall not be made under sub-s. 3 of s. 38 by reason of or in relation to any account delivered on or after June 1, 1889." Now that refers to the provisions of the Act of 1881 for the return of stamp duty where it should turn out that a settlement was voluntary. But in the present case the settlement was certainly in part not voluntary, and therefore there could be no ground for returning any stamp duty.

There is one other question to which I should like to allude. It certainly was considered in many cases that where a person had commenced an action he had a vested right, and that any subsequent statute ought not to be construed as retro-active so as to alter that right. That is not an invariable rule, and it does not apply if the language of the statute is clear and express. This appears from a good many authorities, especially those affecting questions of costs, some of which are: *Freeman* v. *Moyes* (1); *Wright* v. *Hale* (2); *Kimbray* v. *Draper*. (3)

(1) 1 Ad. & E. 338. (2) 30 L. J. (Ex.) 43.
(3) Law Rep. 3 Q. B. 160.

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HAWKINS, J. It is conceded that, if in deciding this case the provisions of the Act of 1881 are to be construed as provided by s. 11 of the Act of 1889, judgment must be given for the Crown. The only question, therefore, is whether we are so to construe the Act of 1881. In my opinion the words of s. 11 of the Act of 1889 cannot be construed as having any other effect. The section says, "shall be construed," and does not provide that the construction declared by it is to be limited to settlements executed after the passing of the Act. The words are of a declaratory character directing that, in all cases where the construction of sub-s. 3 of s. 38 comes in question after the passing of the Act of 1889, the former Act shall be construed as prescribed by the later Act. Judgment must therefore be given for the Crown.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor to Inland Revenue.*
Solicitors for respondents: *Bower, Cotton, & Bower.*

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HAY *v.* JUSTICES OF THE TOWER DIVISION OF LONDON.

Jan. 29.

Inn—Licensing Acts—Conviction for Felony—Queen's Pardon—Effect of—33 & 34 Vict. c. 29, s. 14.

By 33 & 34 Vict. c. 29, s. 14: "Every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid. . . ."

Upon an application for a licence to sell spirits by retail, it appeared that the applicant had been convicted of felony but had received a free pardon under the Royal Sign-manual:—

Held, that the disqualification imposed on him by s. 14 was removed by the pardon, and that the licence might be granted to him.

CASE stated by London Quarter Sessions.

On May 28, 1883, the appellant was convicted of felony, and sentenced to seven years' penal servitude. On November 8, 1883, he was released on licence, and on May 9, 1885, he received a free pardon under Her Majesty's Sign-manual. On July 8, 1889, he applied to the licensing justices of the Tower Division

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to transfer to him the licence of a fully-licensed public-house. They refused on the ground that, he having been convicted of felony within the terms of 33 & 34 Vict. c. 29, s. 14, they had no power to grant the licence. He appealed to quarter sessions against the refusal. The quarter sessions thought that the effect of the free pardon was to remove the disqualification imposed by s. 14, and decided in favour of the appellant.

The question was whether the decision of the quarter sessions was right.

Morton Smith, for the respondents. The decision of the quarter sessions was wrong. By 33 & 34 Vict. c. 29, s. 14: "Every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid. . . ." 3 & 4 Vict. c. 61, s. 7, contains a similar provision as to beer, and 23 Vict. c. 27, s. 22, as to wine licences. The applicant had, it is true, received a pardon under the Royal Sign-manual, which has, by 7 & 8 Geo. 4, c. 28, s. 13, "the effect of a pardon under the Great Seal." But, although the pardon relieved him from fulfilling his sentence, and rendered him a competent witness, it did not remove the perpetual disqualification imposed by 33 & 34 Vict. c. 29, s. 14; and in the same session an Act to abolish forfeitures for felony, and to otherwise amend the law relating thereto—33 & 34 Vict. c. 23—dealt with the effect of suffering punishment, but did not enact that it should render a convict capable of holding liquor licences. "If the King pardons offenders they are thereby rendered competent witnesses, their credit is still to be left to the jury, for the King's pardon takes away pœnam et culpam in foro humano," 2 Hale P. C. 278, and makes the offender, "as it were, a new man, and gives him a new capacity and credit" (2 Hawkins P. C., s. 48, p. 548),—that is to say, enables him to testify; but it does not remove the conviction; if it did, then 9 Geo. 4, c. 32, s. 3, which enacts that punishment endured for felony "shall have the like effects and consequences as a pardon under the Great Seal as to the felony," would render every convict who had completed his term of imprisonment capable of holding liquor licences, and the disquali-

fication in the Licensing Act would only apply while the person convicted was undergoing his punishment, and no longer. "The general title of the Act related to evidence, but the particular recital to this section introduces a new question—the civil status of particular persons": per Cleasby, B., in *Leyman* v. *Latimer* (1), where the effect of a pardon is considered, and the authorities examined. By 7 & 8 Geo. 4, c. 28, s. 13, it is provided that "no free pardon . . . shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the granting of any such pardon." Therefore, it seems that a pardon does not annul the conviction, and the statutes imposing a greater punishment for an offence committed after a previous conviction would operate notwithstanding a pardon for the previous offence. Pardon has the same effect on a conviction whether the convict was guilty or innocent. A guilty convict may by good conduct, such as the defence of a warder, deserve and obtain a pardon. In *Reg.* v. *Vine* (2) the Court of Queen's Bench held that 33 & 34 Vict. c. 29, s. 14, was even retrospective, and Cockburn, C.J., said that the object of it was not to punish offenders, but to protect the public against public-houses in which spirits are retailed being kept by persons of doubtful character. [He also cited *Bullock* v. *Dodds* (3); *Sir Henry Fines' Case.* (4)]

Sir R. E. Webster, A.G. (*R. S. Wright,* and *Danckwerts,* with him), for the appellant. The case must be decided on principle, and not on the mere words of statutes imposing a limited disability for special purposes. The principle is stated in *Cuddington* v. *Wilkins* (5), where the whole Court were of opinion that though the plaintiff, who had been pardoned, were a thief once, "yet when the pardon came it took away not only pœnam, but reatum, for felony is contra coronam et dignitatem regis; when the King had discharged it, and pardoned him of it, he hath cleared the person of the crime and infamy. . . ."; and also in *Leyman* v. *Latimer.* (6) It is evident from the 7 & 8 Geo. 4, c. 28, s. 13, that the legislature supposed that, but for the proviso, a pardon

(1) 3 Ex. D. 15, at p. 19.
(2) Law Rep. 10 Q. B. 195.
(3) 2 B. & Ald. 258.
(4) Godbolt, 288.
(5) 1 Hob. 81.
(6) 3 Ex. D. 15, 352.

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would free an offender from subsequent disabilities. *Reg.* v. *Vine* (1) decides only that a convicted person who has suffered his punishment remains in the position of a person convicted of felony, and is disqualified by 33 & 34 Vict. c. 29, s. 14, from selling spirits by retail; but no question arose in that case as to a free pardon, the effect of which is to do away with the conviction and, with it, all consequent disabilities. Sect. 14 was intended to prevent a person convicted of felony, and therefore one whose character was bad, being the holder of a licence, but did not contemplate the case of a pardon which operates at once on the conviction and restores the person to his credit and character. 9 Geo. 4, c. 32, was to amend the law of evidence in certain cases only.

Morton Smith, in reply.

POLLOCK, B. I am of opinion that the decision of the quarter sessions was right. By 33 & 34 Vict. c. 29, s. 14, "every person convicted of felony shall for ever be disqualified from selling spirits by retail." It is clear that this enactment was intended for the protection of the public who are dependent on the respectability and character of the holders of public-house licences, as Cockburn, C.J., said in *Reg.* v. *Vine*. (1) Similar provisions had been made in earlier Acts, viz., 3 & 4 Vict. c. 61, s. 7, as to beer, and 23 Vict. c. 27, s. 22, as to wine licences. John Hay was convicted of felony. He was afterwards pardoned. The pardon was under the Sign-manual and not under the Great Seal; but by 7 & 8 Geo. 4, c. 28, s. 13, such pardon is equivalent to a pardon under the Great Seal; so for all purposes he is in the same position as if he had a pardon under the Great Seal, and it is unnecessary to pursue any inquiry as to all the provisions which deal with pardons to a prisoner with respect to his competency as a witness. The general question of law next to be considered is, what was the effect of the pardon which John Hay obtained? By the prerogative of the Crown the pardon extends far beyond the mere discharge of the prisoner from any further imprisonment. It is a purging of the offence. The King's pardon, says Hale, "takes away pœnam et culpam": 2 P. C. 278. This points to the char-

(1) Law Rep. 10 Q. B. 195.

acter, condition, and status of the convict. Again, in 2 Hawkins' P. C., s. 48, the author says that pardon "does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness. . ." So in another text-book of authority, 1 Chitty's Criminal Law, 775, it is said that "the effect of a pardon like that of the allowance of clergy, is not merely to prevent the infliction of the punishment denounced by the sentence, but to give to the defendant a new capacity, credit, and character." Nothing could be more clear. These are only text-books; but let us turn to the authority of *Cuddington* v. *Wilkins* (1), where the plaintiff brought an action against the defendant for calling him a thief. The defendant justified, the plaintiff pleaded a general pardon, and on demurrer it was "adjudged for the plaintiff, for the whole Court were of opinion, that though he were a thief once, yet when the pardon came, it took away not only pœnam, but reatum, for felony is contrà Coronam et dignitatem Regis," and it goes on to say that "when the King has discharged it and pardoned him of it he hath cleared the person of the crime and infamy. . ." It was forcibly argued that this does not shew that to all intents and purposes the pardon is to be an absolute purgation of everything. That is quite true; but in *Sir John Bennet* v. *Dr. Easedale* (2) the case was extremely clear on both points. Sir John Bennet had been removed from the office of Chancellor of the Archbishop of York and brought an assize for that office, and the defendant endeavoured to obtain an injunction to stay that suit, because Sir John Bennet had lately been found guilty in the Star Chamber of bribery and other misdemeanours in his office, and had been fined 20,000*l.* and censured to be imprisoned and made incapable of any office of judicature. He produced a pardon; and it was resolved by the judges "that this pardon hath taken away all force of the sentence in the Star Chamber, except for the fine of 20,000*l.*, and all inabilities are discharged thereby, and that the sentence never took from him the office, but the execution thereof, nor gave authority to place others."

(1) 1 Hob. 67, 81.

(2) Cro. Car. 55.

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POLLOCK, B.

That is to say, in respect of the sentence itself—whether he was punishable or not—he must question it further; but his character, position, and credit were consequential disabilities, which were removed. So, both on the language of the Act itself and on principle, it is thoroughly established that the decision of the quarter sessions was perfectly right. No doubt there may be some difficulty on the argument as to other consequences. I think *Reg.* v. *Vine* (1) does not affect the question. There the offender was convicted in 1865, and got a licence after that time, and the Court held that s. 14 applied to a conviction either before or after the Act, and that his procuring a licence did not in any way shew that he had been purged of his offence and sentence. The point was raised by the learned counsel for the respondents, that a felon who has served his sentence is said to be, by virtue of 9 Geo. 4, c. 32, s. 3, in the same position as a felon who has received a pardon. That would tend to shew that when a felon has served his sentence, s. 14 of the Licensing Act would not apply. It might be said, however, that the words of the one Act conflict with the words "for ever be disqualified" in the other. But that is not the question before us, and I give no opinion upon it. We have clear authorities as to the effect of pardon, and there is an absence of all authority to the contrary. The order of quarter sessions was right, and the appeal must be dismissed.

HAWKINS, J. I am glad that we have been able to arrive at the conclusion which my learned brother has announced. It would have been strange if we had found any real difficulty in so doing. With respect to the argument as to the effect of serving a sentence, I think that the intention of the legislature in putting this disqualification on a man convicted of felony disposes of that objection, because every one knows that sentences are for the most part to some extent in the discretion of the judge or magistrate before whom the case is heard. A man may be sentenced to imprisonment for a day or to penal servitude for life. This must have been well known to the legislature at the

(1) Law Rep. 10 Q. B. 195.

time of the passing of 33 & 34 Vict. c. 29, s. 14, and, with that common knowledge, Parliament enacted that "every person convicted of felony shall for ever be disqualified." Those words must have *some* meaning; they would have none if a man convicted of an offence and sentenced to one month's imprisonment was, after undergoing it, in the same position as if he had a free pardon, and, notwithstanding the terms of the statute, could at the end of the month sell spirits by retail. The words "for ever disqualified" shew that the intention of the legislature was that, whatever the sentence may be, the disqualification, unless removed, shall last until his life shall end. Such is my view, and I cannot see any answer to it. Then as to the effect of the Queen's pardon, without discussing further the authorities and statutes, I come to the conclusion that directly the crime of which a man has been convicted is pardoned, he is absolved not only from the punishment inflicted on him by the judge who pronounced sentence, but from all penal consequences, such as the disqualification from following his occupation. To treat it otherwise would be contrary to what certainly must have been the intention of the legislature; for I cannot believe that it was the intention of the legislature that if a man had the great misfortune to be wrongly convicted, and was pardoned on the ground that the conviction was wrong, the Queen's pardon, although absolving him from the pains of imprisonment, should nevertheless leave him to suffer the penal effect of his conviction by being prevented, in future, from following his avocation, notwithstanding the rectification of the error which had occurred. It has been argued that the Queen's pardon may be granted for other reasons than innocence,—that a notorious thief may have received the Queen's pardon in consideration of his having informed and given evidence against his accomplices. I do not know how that may be. Perhaps if he had been convicted, and suffered part of his sentence, and shewn contrition, some remission of his sentence rather than a Queen's pardon would be granted. Having regard to the whole matter and the argument in the present case, I have come to the conclusion that the effect of the Queen's pardon operating on the crime of which the alleged offender had been convicted was to absolve him not only from

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the actual punishment imposed by the judge, but from all the other penal consequences to which I have referred.

Judgment affirmed.

Solicitors for appellant: *The Solicitor to the Treasury.*
Solicitors for respondents: *Phillips, Beal, & Co.*

J. R.

Feb. 6.

SNOWDEN *v.* BAYNES.

Negligence—Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict.* c. 42), *s.* 1, *sub-s.* 3.

In an action for compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff was employed by the defendant to work at a machine in a shed. A carpenter, also in the employ of the defendant, used to receive directions from him or his foreman as to the work to be done, and give orders to the plaintiff and others as to what work each of them should do, which orders they were bound to obey; but he had no control over the plaintiff in his work. One morning the plaintiff was instructed by the carpenter as usual as to the work to be done by him. The plaintiff worked at it, and while he was working overtime in the evening the carpenter proceeded to stack timber in the shed, which was not safe for two persons to work in at the same time. By this negligence of the carpenter the timber fell, causing injury to the plaintiff:—

Held, that the plaintiff was not entitled to recover, as the injury did not result from his having conformed to any order given by the carpenter to do any particular work, and therefore s. 1, sub-s. 3, of the Act did not apply.

APPEAL from the Brompton County Court.

The facts were stated in the judgment of the Divisional Court as follows:—

The plaintiff sued the defendant in the Brompton County Court under the Employers' Liability Act for injuries received by him under the following circumstances.

The plaintiff was a machinist in the employment of the defendant. He was accustomed to work at a particular machine in a particular shed. One Sellick, a carpenter, used to receive directions from the defendant, or his foreman, as to the work to be done—and he gave orders to the plaintiff and to other men as to what work each of them should do; and those orders they were bound to obey. Sellick's duty and authority with respect to the plaintiff went no further, and in the performance by the

plaintiff of the work which had been assigned to him the plaintiff received no directions from Sellick, and was in no way under his control.

On the morning of the day on which the accident happened, the plaintiff was told by Sellick what work he was to do, and according to the ordinary course of his work he went to the shed and to the machine above mentioned to do his day's work. There was evidence that the shed was not a safe place for two people to work in at once—in what respect unsafe it did not appear. The plaintiff's regular time for leaving off work was half-past five, but on the evening in question he had elected to work till seven. Towards the end of the day, Sellick came in to do some work in the shed, and he and another man began to stack some timber in the neighbourhood of the plaintiff. The plaintiff asserted that Sellick at that time directed him to go on with his work, although he himself was at work in the shed. But the jury found that this was not so. In the course of his operations in stacking the timber, Sellick, by admitted negligence, caused a piece of timber to fall. It struck the plaintiff's right arm; the jerk threw the plaintiff's left hand into the machine, and he lost three fingers.

The learned county court judge left to the jury, so far as is material to the present discussion, two questions. 1. Was Sellick a person to whose orders the plaintiff was bound to conform? To which the jury said "Yes." 2. Was the plaintiff at the time of the accident acting under Sellick's orders, and whether general or special? To which the answer was, "Under the general orders given that morning."

Upon these findings the county court judge directed a verdict for the plaintiff."

1890. Jan. 17. *Ruegg*, for the defendant, moved to enter judgment for him. There was no evidence that the plaintiff was injured by reason of the negligence of any person in the service of the defendant to whose orders or directions the plaintiff at the time of the injury was bound to conform, and did conform, and that such injury resulted from his having so conformed within the meaning of s. 1, sub-s. 3, of the Employers' Liability Act, 1880.

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The Court called on

Aspland, Q.C., (*H. Parkes Wilkinson*, with him), for the plaintiff. There was evidence for the jury of negligence within sub-s. 3. If the intention had been to restrict sub-s. 3 to orders or directions involving negligence the section would have been differently framed. Sellick had some authority over the plaintiff, and was therefore a person having superintendence within sub-s. 2. He gave an order, and there was negligence when he himself took part in the work and made it dangerous to comply with the original order. The argument for the defendants would limit the effect of sub-s. 3 to the cases provided for by sub-s. 2.

In *Millward* v. *Midland Ry. Co.* (1) the carman through whose negligence a boy assisting him was injured gave no order at all, yet the plaintiff recovered damages under sub-s. 3; and Day, J., said no express order was necessary if it could be implied from the circumstances. In the present case Sellick ordered the plaintiff to work in the shed, and afterwards came himself and worked there without telling him to stop, and thereby must be taken to have ordered the plaintiff to go on working. He did so, and was injured through that negligence of Sellick. In *Dolan* v. *Anderson* (2) the order and the negligence were unconnected. *Kellard* v. *Rooke* (3) does not affect the above decisions, for in that case there was no express order at all, and no course of business from which any order could be implied.

Ruegg, in reply. Assuming that Sellick was a person within sub-s. 3, there was no evidence of any negligent order given by him in conforming to which the plaintiff was injured. The order conveyed to the plaintiff in the morning was a proper one. The negligence of Sellick was merely in the manual labour of stacking wood. The plaintiff was not at the time of the injury "bound to conform" to his orders, for both were working overtime. As in *Kellard* v. *Rooke* (4), so here there was "no order, either express or implied, to the plaintiff which caused the injury, and the sub-section is not applicable": per Lord Esher, M.R.

Cur. adv. vult.

(1) 14 Q. B. D. 68.
(2) 22 Sc. Law Reporter, 529.
(3) 21 Q. B. D. 367.
(4) 21 Q. B. D. 367, at p. 370.

1890. Feb. 6. The judgment of the Court (Pollock, B., and Wills, J.) was delivered by

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WILLS, J., who, after stating the facts as above set forth, said:—The learned counsel for the plaintiff contended that the case fell within the 3rd sub-section of s. 1 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), that Sellick was a person to whose orders or directions the plaintiff at the time of the injury was bound to conform, and did conform, and that the injury resulted from his having so conformed.

We think that Sellick was a person to whose orders as to what specific work he should do, but no further, the plaintiff was bound to conform. We think that the only order which affects the present case was the order given in the morning to do the work which plaintiff did, and that unless the injury can be said to have been the result of his having obeyed the order to do the particular piece of work selected for him he cannot recover.

It seems to us that there is no connection between his doing that piece of work rather than any other, and the accident. Sellick had no authority to send him to any other place to work, or to exercise any discretion, or give any orders as to where he should go to do the work. Whatever work Sellick had told him to do he would have been in the same place, so that it was in no sense the exercise by Sellick of an authority vested in him and exercised by him that brought the plaintiff into what ultimately proved to be a place of danger. We think the order which is contemplated by this sub-section must be one which is really that of the person in the position of Sellick, and which is the direct offspring of some choice or exercise of judgment and will on his part; if not, it is not his order at all. Sellick had authority to say, "You shall do this bit of work or that bit of work," but not "you shall do it at this place or that place." The choice of place rested with some one else. So far as the evidence goes upon this point, the shed in question was the plaintiff's regular place of work, and it has not been suggested that either he had any choice, or Sellick any control in respect of the place where the work should be done.

There is another respect in which it is equally clear that the fact of the plaintiff being at the place of danger at the time

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when Sellick's negligence caused the accident was not due to any order of Sellick's. The accident took place shortly before seven. The plaintiff's own account is that his regular time was up at half-past five, that the timekeeper came round at three and asked him how long he would work, whereupon the plaintiff said he would work until seven. It was therefore his own doing and not Sellick's that he was there between half-past five and seven, and the jury negatived the suggestion arising from certain parts of the evidence, not necessary to set out, that the accident arose from a special order of Sellick's that the plaintiff should continue to work whilst Sellick was doing that which proved dangerous to the plaintiff.

We think that, for the reasons stated, the case of *Millward* v. *Midland Ry. Co.* (1), which was much relied upon for the plaintiff, has no bearing upon the present discussion, and we think it better not to attempt to lay down any law which goes beyond this case. We think it right, however, to point out that, besides the broad distinction we have already dealt with, there is one obvious difference (whether affecting the right of action or not) between a case in which the circumstances of danger are brought about by the performance on the part of the person injured of acts the direct result of obedience to an order then and there given, and which then expose him to immediate risk, if the person giving the order be careless, and a case in which obedience to the order is accompanied by no circumstance of present risk from the negligence of the person giving the order, and in which, if the mere fact that obedience to the order involves the presence of the workman in a spot where he is afterwards endangered by acts of the person giving the order is sufficient to give a right of action, the liability may flow from an order given a week or a month before the accident happened. In such a case it is obvious that such an order might amount to very little more than the mere selection of a particular workman to be employed upon a particular job, and it is difficult to suppose that such a case could be within the act. Each case, however, must be dealt with upon its own facts. In the present case the facts do not establish even the selection by Sellick,

(1) 14 Q. B. D. 68.

either as regards person or place, of the plaintiff to stand in the spot which proved to be one of danger, and we are clearly of opinion that the judgment of the learned county court judge must be reversed, and judgment entered for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Judge & Priestly.*
Solicitor for defendant: *E. Hodgskin Peach.*

J. R.

ROGERS & CO. *v.* LAMBERT & CO.

Feb. 10.

Bailment—Title of Bailor—Determination of—Jus Tertii— When Bailee estopped from setting up.

In an action for wrongful detention of certain copper which had been bailed by the plaintiffs to the defendants, as warehousemen, to hold to the plaintiffs' order, the defendants sought to administer interrogatories as to whether the plaintiffs had not since the date of the bailment sold the copper to a firm of M. K. & Co., and been paid the price, and whether they had not indorsed and handed to M. K. & Co. delivery orders in respect of the copper. It appeared that M. K. & Co. were claiming the copper from the defendants; but it was admitted by the defendants that they were defending the action for their own interest alone, and not under the authority of M. K. & Co.:—

Held, that the defendants could not as against their bailors set up the title of third parties, under whose authority they did not claim to defend, and that consequently the facts to which the interrogatories were directed not affording any defence to the action, the interrogatories must be disallowed.

APPEAL from an order of Charles, J., allowing interrogatories.

This was an action for wrongful detention of 200 tons of copper, which had been purchased by the plaintiffs from the defendants, and paid for, and which had been left in the possession of the defendants as warehousemen, and in respect of which the defendants had given to the plaintiffs delivery orders, and undertaken to hold the copper against such orders. The defendants pleaded a denial of the plaintiffs' property in the copper and, with the object of establishing that defence, sought to administer the following interrogatories to the plaintiffs:—

1. Whether after the bailment of the copper to the defendants the plaintiffs had not sold the same to a firm of Morrison,

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Kekewich & Co., and whether Morrison, Kekewich & Co. did not by reason of such sale become entitled to the property in and possession of the copper?

2. Whether the plaintiffs did not make some, and what contract, with Morrison, Kekewich & Co., whereby they became entitled to the property in and possession of the copper, and if yea, whether anything had since happened to disentitle them thereto?

3. Whether the plaintiffs did not before action indorse and hand to the said Morrison, Kekewich & Co. delivery orders in respect of the copper?

4. Whether Morrison, Kekewich & Co. had paid the plaintiffs for the copper?

It appeared that an action had been commenced by Morrison, Kekewich & Co. against the defendants, claiming delivery of the copper from them, but the defendants defended the action in order to enable themselves to set up a heavy counter-claim which they had against them, and held the copper to answer that counter-claim. It was admitted by the defendants that they were defending the present action for their own interest alone, and not under the authority of Morrison, Kekewich & Co.

Charles, J., allowed the interrogatories, and from his order the plaintiffs appealed.

Cohen, Q.C. (*Mansel Jones*, with him), for the plaintiffs. These interrogatories are not relevant to any matter which would afford a good defence to the action. The defendants, as bailees of the copper, are estopped from disputing the plaintiffs' title; they cannot set up jus tertii unless they defend upon the right and title, and with the authority of the tertius, in accordance with the rule laid down in *Biddle* v. *Bond.* (1) Unless they defend with that authority, their only alternative is to interplead.

J. V. Austin, for the defendants. There is no estoppel here. The principle of *Biddle* v. *Bond* (1) has no application to a case where the title of the third party, at the time of defence pleaded, is consistent with the bailor having been entitled at the date of the bailment. That is the case here; whereas in *Biddle* v.

(1) 6 B. & S. 225.

Bond (1) the defendant denied his bailor's title at the date of the bailment, and therefore it was essential for him to shew that he defended by the authority of the third party. The principle on which a bailee is in certain cases estopped from disputing his bailor's title is identical with that on which a lessee is estopped from disputing the title of his landlord. The lessee may not allege that his lessor had no title at the date of the lease, but he may always shew that the lessor's title has expired since the lease granted, and à fortiori may he shew that it has expired by the lessor's own act in assigning over the reversion. And that is precisely analogous to what has happened here.

Cohen, Q.C., in reply.

DENMAN, J. I do not think that the order that the plaintiffs should answer these interrogatories can be supported. The action is brought for a refusal by the defendants to deliver up certain copper, which the plaintiffs had purchased of the defendants, and had left in the custody of the defendants as bailees. The defence aimed at in the interrogatories is that the plaintiffs have ceased to have any property in the copper, having sold it to third parties, and having indorsed the delivery orders to such purchasers. But assuming those facts to be true, it appears to me that they would afford no defence, for the mere indorsement of the delivery orders would not free the plaintiffs from their responsibility to their purchasers, and consequently the defendants are not relieved from their responsibility towards the plaintiffs to deliver up the copper to them and thereby to enable them to fulfil their contract with the third parties. The defendants seek to get these interrogatories answered with the view of making out that, the property in the copper having been transferred to such third parties, they (the defendants) would have no answer to an action at the suit of the transferees to recover the copper, and that under those circumstances the proper persons to sue them would be the transferees and not the plaintiffs, and the admitted object of the defendants in making out this case is to enable themselves to take advantage of a heavy counter-claim which they are entitled to against such

(1) 6 B. & S. 225.

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transferees. But I do not think that because it might be convenient to the defendants to be brought into litigation with those persons instead of with the plaintiffs, they have any right as against the plaintiffs to select which party shall sue them. To my mind, Mr. Cohen was quite right in saying that there was nothing in principle to distinguish this case from that of *Biddle* v. *Bond* (1), where it was established that a bailee was estopped from disputing his bailor's title unless he claimed to defend under the authority of the party in whom he alleged the title to be. And there is no suggestion here that the defendants defend under the authority of the persons who are suggested to have purchased the copper from the plaintiffs. I think the learned judge's order must be reversed, and the interrogatories disallowed.

WILLS, J. I am of the same opinion. This is in form an application to administer interrogatories; but the case raises a very much more serious question than that of a mere right to interrogate, involving as it does an important principle of commercial law. The plaintiffs being the bailors of the defendants, and having the defendants' acknowledgment that they held the copper to the plaintiffs' order, had, in the ordinary course of their business, sold the copper to Messrs. Morrison, Kekewich & Co., and indorsed to them the delivery orders which they had received from the defendants,—at least, this is the state of facts which the interrogatories suggest;—and the question is whether under those circumstances the defendants are entitled to say that they will not deliver the copper to the plaintiffs.

No doubt if the defendants had delivered the copper to Morrison, Kekewich & Co., in pursuance of the delivery order, that would have afforded a good defence to the present action, but no such excuse for non-delivery of the copper to the plaintiffs is here set up; on the contrary, the defendants seek to hold the copper against Morrison, Kekewich & Co. in order to meet a claim which they happen to have over against them. The result of this conduct on the part of the defendants is to leave the plaintiffs exposed to an action at the suit of Morrison,

(1) 6 B. & S. 225.

Kekewich & Co. for failure to satisfy their contract of sale to them. This liability of the plaintiffs to their vendees in my judgment leaves them a sufficient interest in the copper to enable them to maintain this action. The defence, therefore, to which the interrogatories are directed, even assuming it were sufficiently raised upon the pleadings, would be no defence in law; and the interrogatories consequently not being relevant to any matter which would afford a good defence to the action, must be disallowed.

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Appeal allowed.

Solicitors for plaintiffs: *Druces & Attlee.*

Solicitors for defendants: *Johnson, Budd, & Johnson.*

J. F. C.

STUBBS AND ANOTHER *v.* THE DIRECTOR OF PUBLIC PROSECUTIONS.

Feb. 13.

Criminal Law—Prosecution—Vexatious Indictments Act (22 & 23 *Vict. c.* 17)—*Refusal by Justice to commit—Bill preferred—Intervention of Public Prosecutor—Acquittal—Liability for Costs*—30 & 31 *Vict. c.* 35, *s.* 2; 42 & 43 *Vict. c.* 22, *s.* 7.

By 30 & 31 Vict. c. 35, s. 2, whenever any bill of indictment shall be preferred under the Vexatious Indictments Act (22 & 23 Vict. c. 17), against any person who has not been committed . . . . to answer such indictment and the person accused thereby shall be acquitted thereon, it shall be lawful for the Court before which such indictment shall be tried, in its discretion, to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred, shall pay to the accused person his costs to be taxed.

By the Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22), s. 7, where any criminal proceeding is instituted, undertaken, or carried on by the director of public prosecutions, such director shall not be bound over to prosecute or conduct such proceeding, or required to give security for costs, and it shall not be necessary to bind over any person to prosecute or conduct such proceeding, and if any person is so bound over, or has given security for costs, he shall, upon the director of public prosecutions undertaking the case, be released from such obligation, and the security shall be deemed to have been cancelled, "and the director of public prosecutions shall be liable to costs in lieu of such person."

A charge of conspiracy was made before a magistrate, who refused to commit the persons charged. The prosecutor thereupon entered into his recognizances under 22 & 23 Vict. c. 17, and preferred an indictment against the defendants, which was found by the grand jury. The director of public prosecutions then

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undertook the prosecution. The defendants were tried and acquitted, and the Court ordered the public prosecutor to pay the costs. The original prosecutor had given no security for costs:—

Held, that s. 7 of 42 & 43 Vict. c. 22, imposed no greater liability on the director of public prosecutions than that from which the original prosecutor was relieved, viz., the costs for which he was liable under his security, and that the order was therefore invalid.

SPECIAL CASE.

The facts and arguments sufficiently appear from the judgment of the Court.

1890. Feb. 10. *Finlay, Q.C.*, and *T. Willes Chitty*, for the plaintiffs.

Sir R. E. Webster, A.G. (*Avory*, and *Danckwerts*, with him), for the defendant.

Cur. adv. vult.

1890. Feb. 13. CAVE, J. The question in this case was whether an order of the Central Criminal Court of October 25, 1886, as amended by another order of January 31, 1887, is a good order. The Court thereby orders the director of public prosecutions to pay to Messrs. Stubbs & Irving a sum of 164*l.* 17*s.* for their costs of defence upon an indictment for criminal conspiracy. This order, it is said, is properly made under 30 & 31 Vict. c. 35, s. 2. In November, 1885, a Mr. Gostling charged Messrs. Stubbs & Irving with criminal conspiracy. The Lord Mayor, who heard the charge, declined to commit. Thereupon Mr. Gostling entered into his recognizances under 22 & 23 Vict. c. 17, and preferred a bill of indictment against Messrs. Stubbs & Irving at the Central Criminal Court, on May 3, 1886, which bill was found. After the finding of the bill the director of public prosecutions undertook the prosecution, and on August 3, 1886, Messrs. Stubbs & Irving were tried and acquitted. Mr. Gostling had given no security for costs. On September 13, 1886, the Recorder made the order dated October 25, 1886, ordering the prosecutor or other person by or at whose instance the indictment was preferred to pay Messrs. Stubbs & Irving the costs, and on January 31, 1887, he amended the order by ordering the director of public prosecutions to pay them.

For the plaintiffs, it was contended by Mr. Finlay, that the order was good under 30 & 31 Vict. c. 35, s. 2, and 42 & 43 Vict. c. 22, s. 7. By 22 & 23 Vict. c. 17, entitled "An Act to prevent Vexatious Indictments for certain Misdemeanors," no indictment for (amongst other offences) conspiracy is to be presented to any grand jury, unless (among other alternatives), the prosecutor has been bound over to prosecute the accused where the magistrate has dismissed the charge. By 30 & 31 Vict. c. 35, s. 2, it is enacted that, "Whenever any bill of indictment shall be preferred to any grand jury under the provisions of 22 & 23 Vict. c. 17, against any person who has not been committed to or detained in custody, or bound by recognizance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the Court before which such indictment shall be tried, in its discretion, to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred shall pay unto the accused person" his just and reasonable costs to be taxed. By 42 & 43 Vict. c. 22, s. 7: "Where any criminal proceeding is instituted, undertaken, or carried on by the director of public prosecutions, such director shall not be bound over to prosecute or conduct such proceeding, or required to give security for costs, and it shall not be necessary to bind over any person to prosecute or conduct such proceeding, and if any person is so bound over or has given security for costs, he shall, upon the director of public prosecutions undertaking the case, be released from such obligation, and the security shall be deemed to have been cancelled, and the director of public prosecutions shall be liable to costs in lieu of such person." Now, it is clear that in this case no order such as that in question could have been made on the director of public prosecutions under 30 & 31 Vict. c. 35, alone, seeing that he was not the person by or at whose instance such indictment was preferred. 42 & 43 Vict. c. 22, s. 7, is quite general and is not confined to cases coming under the Vexatious Indictments Act. Where the director of public prosecutions undertakes the prosecution, it releases the prosecutor who has been bound over from his obligation, and where he has given security for costs the security is to be deemed

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CAVE, J.

to have been cancelled. So far there is no indication of any intention to relieve the prosecutor from any costs he may be ordered to pay under 30 & 31 Vict. c. 35, s. 2.

The concluding words of the clause are relied on for this purpose: they are, "and the director of public prosecutions shall be liable to costs in lieu of such person" (42 & 43 Vict. c. 22, s. 7.) Looking, however, at the grammatical construction, I think these words must be read to impose no more liability on the director of public prosecutions than that from which the original prosecutor is relieved by the preceding words—that is, the costs for which he is liable under his security.

But for the words "the director of public prosecutions shall be liable to costs in lieu of such person," no one would have been liable for the costs for which security had been given, and it seems more natural to read these words as imposing on the director of public prosecutions the liability from which the original prosecutor had by the preceding words been released, rather than to construe them as imposing a liability on the director of public prosecutions greater than that from which the original prosecutor had just been released, and so to give the original prosecutor an immunity that there is nothing in the preceding words to shew that he was intended to have.

If it had been intended by the last clause that the director of public prosecutions should bear the costs which might be ordered to be paid under 30 & 31 Vict. c. 35, in such a case as this, I should certainly have expected to find in the preceding words some indication of an intention that the original prosecutor should be relieved from them.

If, then, this is the natural interpretation of the language of the section, is it also the reasonable one?

It is said that it is unreasonable that the original prosecutor should remain liable for the costs when he has lost all control over the conduct of the prosecution. There would be more force in this observation if the liability to the costs followed automatically on the acquittal of the accused. But this is not so. The Court is to make the order in its discretion; and, considering that the object of the section giving the Court power to order the prosecutor to pay the costs was to discourage vexatious indict-

ments too frequently preferred for purposes of extortion, it seems far more consonant with reason that in such a case as the present the liability should remain on those who originally started the prosecution and preferred the indictment, rather than that it should be transferred to the public prosecutor, whose action in undertaking a prosecution already commenced and taking up a bill already found the legislature cannot reasonably have intended to discourage. If the defendant has been acquitted by reason that the prosecution was vexatious in its inception, there seems no adequate reason why the original prosecutor should be relieved from the burden of paying costs simply because in the interests of justice the director of public prosecutions has thought it right to intervene.

If the prosecution was not vexatious in its inception, but has failed by reason of the difficulty of proving the case, or even by reason of the intervention of the director of public prosecutions, those seem reasons, not why the director of public prosecutions should pay the costs, but why the defendant should not get his costs, and unless it was shewn that the prosecution was vexatious, that is, begun or continued without reasonable and probable cause, or frivolous, I imagine that the Court, in the due exercise of its discretion, would decline to give the defendant the costs of the trial.

It is not necessary in this case to consider the wider question whether an order under 30 & 31 Vict. c. 35, can in any case be made on the director of public prosecutions. It is enough to say that in this case, for the reasons given above, such an order could not be made, and therefore our judgment must be for the defendant with costs.

I should like to add for myself, that of course we have not had before us the merits of the case, and are deciding simply on the point of law; but I find it very difficult to conceive what the circumstances could be which would justify such an order being made on the director of public prosecutions.

A. L. SMITH, J. It is clear that the director of public prosecutions in the circumstances of this case could not be ordered to pay costs by reason of 30 & 31 Vict. c. 35, s. 2, for the simple reason that he was not the person who had preferred the indictment.

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But it was alleged that he could be made to pay by reason of 42 & 43 Vict. c. 22, s. 7, the last words of which section enact that in certain cases "the director of public prosecutions shall be liable to costs in lieu of such person"—that is, in lieu of the original prosecutor; and I own, for myself, that it is a captivating argument, and one likely to lead to the conclusion which was wanted unless we look carefully into the section to see what that section in fact provides.

That section, as it seems to me, is perfectly clear when its phraseology is closely scrutinized. It is a section under which, in certain events, the public prosecutor may incur certain responsibilities; but, in my opinion, the public prosecutor is only to incur under that responsibility from which the original prosecutor had been relieved.

The section says that, "Nothing in this Act shall interfere with the right of any person to institute, undertake, or carry on any criminal proceeding. Where any criminal proceeding is instituted, undertaken, or carried on" (in this case it has been "undertaken") "by the director of public prosecutions, such director shall not be bound over to prosecute or conduct such proceeding, or required to give security for costs,"—the meaning of that is obvious, because the public prosecutor is there as an officer of state, and it would not be necessary to bind him over or to make him give security for costs,—"and it shall not be necessary to bind over any person to prosecute or conduct such proceeding,"—that is, when the public prosecutor intervenes,—"and if any person is so bound over,"—as the original prosecutor, Mr. Gostling, was in this case, bound over to prosecute,—"or if any such person"—that is, the individual prosecutor—"has given security for costs"—which he had not to give in this case, because it was not a case in which security could be called for—"he"—that is, the original prosecutor—"shall, upon the director of public prosecutions undertaking the case, be released from such obligation"—that is the obligation which he entered into by reason of his recognizance to prosecute and being bound over, and he shall also be released from any security which he had given, or—in the words of the statute—"and the security"—for costs—"shall be deemed to have been cancelled."

So far, of course, the public prosecutor is not touched; but the other original prosecutor is released, and he is released from two things, namely, from his obligation to prosecute and from his obligation as to security for costs, if and when he has given them. Then the section goes on, and it says, "and the director of public prosecutions shall be liable to costs in lieu of such person." Liable to what costs? The meaning of that, in my judgment, is plain. What the original prosecutor is released from the director of public prosecutions comes under obligation to, no more and no less. And what the original prosecutor has been released from here is his obligation to prosecute which was undertaken by the public prosecutor, and his obligation as to security for costs, if any, had been given, and as to those costs only does the public prosecutor come into the responsibility.

It seems to me that on this reading of the section the case is clear, and that the second order, at any rate, even if it could have been made in the Court in which it was made, is not an order which should have been made by the learned recorder. For these reasons I think that the judgment should be for the defendant.

Judgment for the defendant.

Solicitors for plaintiffs: *C. O. Humphreys & Sons.*
Solicitor for defendant: *The Solicitor of Inland Revenue.*

J. R.

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Jan. 21.

ONSLOW *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Settlement—Contingent Interests—Stock vested in Trustees—Power to vary Investments—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *s.* 3 —*Schedule.*

By the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 3, and schedule, an ad valorem duty is imposed on "Any instrument . . . whereby any definite and certain principal sum of money . . . or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever":—

Held, that a settlement of contingent and reversionary interests in certain specified amounts of stock which was vested in trustees with power to vary the securities at their discretion, was liable to duty under the section and schedule.

CASE stated by the Commissioners of Inland Revenue pursuant to 33 & 34 Vict. c. 97.

On April 21, 1888, an instrument was presented on behalf of the parties to the Commissioners of Inland Revenue under the provisions of s. 18 of the Stamp Act, 1870, for the opinion of the Commissioners as to the amount of stamp duty with which the instrument was chargeable.

The instrument was a settlement of certain moneys, stocks, funds, and securities set forth in three schedules thereto, or of the interest of Marion Oliver therein, and also contained certain covenants not relating to such moneys, stocks, funds, and securities or the said interest therein.

The moneys, stocks, funds, and securities specified in the three schedules to the settlement were according to the average prices on the day of the date thereof of the total aggregate value of 209,370*l.* 11*s.* 5*d.*

The Commissioners being of opinion that the instrument was chargeable under the head "Settlement" in the schedule to the said Act with the duty of 523*l.* 10*s.*, being the ad valorem settlement duty of 5*s.* per centum on the sum of 209,370*l.*, and also by reference to s. 8 of the Act and the said schedule with the duty of 10*s.* as a "deed of any kind whatsoever not described in this schedule" in respect of the other matter contained in the instrument, assessed the duty thereon accordingly.

The question to be decided by the Court was, whether the

instrument was chargeable with the duties of 523*l.* 10*s.* and 10*s.*, in accordance with the assessment of the Commissioners.

It appeared from statements of the appellants' counsel made, at the request of the Court, as to the facts and the effect of the documents referred to in the case, that George Pickup died intestate in 1834, leaving two daughters, Ann Loxam Pickup and Georgina Pickup. In 1849 and 1856 they executed cross-settlements. The eldest, Ann, being entitled to her share of her father's estate, and also to her share of the estate of a brother who died in infancy, on attaining her majority in 1849 settled this property on herself for life without power of anticipation, remainder to such children as she should by deed or will appoint, remainder upon the same trusts in favour of her sister Georgina and her children, and remainder to the next of kin. In 1856 Georgina, on coming of age, made a cross-settlement in similar terms. At that time neither of them had children. In 1860 Georgina married George Oliver, and in 1861 had a daughter, Marion, the settlor. Ann never married, and was living. In 1868 James Pickup, uncle of Ann and Georgina, died. By his will of January 8, 1868, he devised one moiety of his property to his eldest niece, Ann, for life, remainder to such of her children as she should by will appoint, and remainder, if no children, upon the trusts declared for the other moiety which he left to Georgina for life with the same remainder and cross-remainder over, with certain provisoes in case there were no children of either niece. In April, 1888, Georgina, the mother, executed three appointments under her powers. At the date of the settlement by Marion in question, Ann was unmarried and of the age of sixty years, and Georgina was of the age of fifty-four. The first interest of Marion Oliver, the settlor, was one moiety in reversion expectant on the death of her mother of the net proceeds of the sale, calling in, and conversion of the real and personal estate of her uncle, James Pickup, devised by his will, and another moiety, in reversion expectant on the death of her aunt and her mother, and contingent on the death of the aunt without issue. The whole of those funds were standing in the name of George Oliver, the sole surviving trustee, and the investments were subject to variation at the will of the trustees, with the consent of the

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mother, who had the life interest. The second interest under the settlement was a reversionary interest, expectant on the death of her mother, and subject to defeasance, who had 19,000*l.* also standing in the names of trustees and in investments to be varied at her will. The third interest was an interest in reversion, expectant upon the death of both mother and aunt, contingent upon the death of the aunt without issue, and subject to revocation if the mother had issue, in 1400*l.* standing in the names of trustees in investments liable to be varied.

Horne Payne, Q.C. (*Danckwerts*, with him), for the appellants. The settlement of a contingent interest in an indefinite amount of stock is not a settlement "whereby any definite and certain principal sum of money or any definite and certain amount of stock or any security is settled" within the schedule of 33 & 34 Vict. c. 97. (1) The stock was not in the possession of the settlor. She had no legal right to it, but it was in the name and control of trustees, with an absolute power of disposing of it by changing the investments. The words "definite and certain" refer to the nature of the interest, and exclude contingent interests. No stamp duty is payable even on specific stock which is not vested in the settlor, and in which she has no property. The present provision in the Stamp Act, 1870, is an abridgment of the earlier Stamp Act (55 Geo. 3, c. 184) s. 1, whereby stamp duty, as distinguished from succession and other duties, was payable only on a settlement of a definite and certain sum of money, or a definite share in certain specified Government stock, then standing in the settlor's name, and under his immediate control.

(1) By 33 & 34 Vict. c. 97 (the Stamp Act, 1870), s. 3, there shall be charged upon the several instruments specified in the schedule to this Act the several duties in the said schedule specified, and no other duties.

Schedule. "Settlement. Any instrument, whether voluntary or upon any good or valuable consideration, other than a bonâ fide pecuniary consideration, whereby any definite and certain and principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever: For every 100*l.*, and also for any fractional part of 100*l.*, of the amount or value of the property settled or agreed to be settled . . . 5*s.*"

The only decision on this section is *Sanville* v. *Commissioners of Inland Revenue* (1), in which the Commissioners had charged stamp duty upon a settlement of a life policy of insurance for 4000*l.*, and the Court held that it was not a definite and certain principal sum of money. Pollock, C.B. (at p. 166), said the case was not within "the plain language and spirit of the Act, whether it was within the intention of its framers or not." The instrument in question is certainly not an "agreement to settle." The settlor enters into no contract, but does a present act, viz., by deed vests certain reversionary and contingent rights in funds which for the time being are in a certain form. It is not a definite sum of money, as the value of the stock constantly varies, and it cannot be a definite or certain sum of stock which is subject to a contingency. The Court will not take into consideration the probability of the contingency of death without issue. There must be some actual interest either in possession or reversion. The Act contemplates a settlement of a sum of money in possession, or of a sum of Consols or other securities transferable by assignment. It is stated in Vaizey on Settlements, vol. ii., p. 1524, that where "the interest is not indefeasibly vested in the covenantor it would be necessary, before the liability of the instrument to an ad valorem stamp duty could be established, to determine the question whether the contingency or defeasibility of the covenantor's title did or did not hinder the covenant from operating as an agreement to settle a definite and certain sum."

Sir E. Clarke, S.G., and *Dicey*, for the respondents, were not called upon to argue.

POLLOCK, B. There are only two points in this case, and to state them almost answers them. The most substantial point was that the interest under the settlement was contingent upon the death of the aunt. The argument amounts to this, that in a case in which the settlor is not in present possession of that which is settled the settlement does not require to be stamped. Apart from the words of the Stamp Act, it would be strange that a settlement which is perfectly good in law should

(1) 10 Ex. 159.

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Pollock, B

not, for the purposes of revenue, be treated as a settlement which had the effect of disposing of the property. That is the real test. Then on the language of the Act the matter is clear. The schedule says: "Any instrument . . . . whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled." And for this purpose what is the interest of the settlor? It is remarkable that in s. 125 it is provided that "where any money, stock, or security is settled or agreed to be settled by a person who has only a reversionary interest therein, and the instrument whereby such settlement is made or agreed to be made contains a covenant by the person entitled in possession to the interest or dividends of such money, stock, or security for the payment, during the continuance of such possession, of any annuity," and so forth, then that instrument is not to be charged with any duty in respect of such covenant, shewing that those who drew the Act had a good knowledge of every-day practice—that is to say, that persons making a settlement settle contingent property as well as property actually in their own possession. Such is the common case of a father, son, and his child. The father may be a man of eighty years of age, and the son sixty years of age, and they wish to make provision for a child about to be married. In certain ranks of life, with a certain class of people, the ordinary rule is that old stock is converted in order to provide for a child about to be married; and to say that a man, when he settles a specific sum, is not making a settlement within the terms of this section, is a contention I cannot understand. The other point was that this was not specific stock. It is argued that, although the parties have stated in the schedule the actual specific stock now held by the trustees, it is not to be treated as specific stock, because, at any time, it may be changed by the trustees. It sometimes happens that a specific stock is purposely made unconvertible. In such a case the argument would not apply. It would be strange that in that case stamp duty should be payable, but no stamp duty payable where the trustees have the

ordinary option of converting the stock within a certain range of securities. I cannot see that the words of the Act of Parliament, by using the words "specific stock," are favourable to the appellant in any sense; and it is sufficient to say in this case that there is now an existing stock, and that stock set out in the schedules, if it becomes changed afterwards, is within the power created by the original settlement, and it does not require any very solemn consideration of the law to say that, if London and North-Western Stock is sold out and London and South-Western Stock bought, though it is different stock, it is for all legal purposes the same stock as that which is dealt with in the settlement. It seems to me there is no ground for the contention.

HAWKINS, J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellant: *Rowcliffes, Rawle & Co.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

J. R.

IN RE JONES. EX PARTE JONES.

March 21.

Bankruptcy—Conditional Discharge—Judgment Debt—"Conduct and affairs" of Bankrupt—Future prospects of Property—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-ss.* 2, 6.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 28 (2), on the hearing of an application for an order of discharge the Court shall take into consideration a report of the official receiver as to the bankrupt's "conduct and affairs," and may grant an absolute order of discharge or "an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property . . ."

By sub-s. 6: "The Court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the official receiver or trustee for any balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the Court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts."

In July, 1885, judgment in an action for breach of promise of marriage was recovered against the bankrupt for 500*l.* damages. In January, 1886, his father died, having by a will, made five days before death, given substantial

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interests in property which was worth about 3600*l.* to all his children except the bankrupt, to whom a legacy only of 10*l.* payable on the death of his mother was left by the testator. In April, 1889, a receiving order was made against the bankrupt on his own petition. There were practically no assets, and the only creditor was the judgment creditor, who proved for 596*l.*, being the damages, costs, and interest on her judgment debt. Shortly before the petition was filed the family of the bankrupt offered, in satisfaction of her judgment, 250*l.*, which she refused. The county court judge granted to the bankrupt an order of discharge subject to his consenting to a judgment for 250*l.* being entered up against him, such judgment to be deemed to be satisfied if the bankrupt paid to the official receiver 200*l.* within a month:—

Held, that the facts and circumstances above-mentioned were part of the "conduct and affairs" of the bankrupt which could be considered by the Court under s. 28 (2); that they were sufficient to warrant the judge in drawing the inference that the bankrupt would probably come into possession of property in the future, and had presented his petition in order to get rid of his creditor, and enjoy subsequently-acquired property without having to pay any portion of the debt, and that the order was therefore valid.

APPEAL from the Wrexham County Court.

The facts and arguments appear in the judgment.

1890. Feb. 12. *Cooper Willis, Q.C.* (*F. C. Willis*, with him), for the appellant, in addition to the cases cited in the judgment, referred to *In re Huggins, Ex parte Huggins* (1); *In re Cook, Ex parte Cook.* (2)

Muir Mackenzie, for the official receiver.

Cur. adv. vult.

1890. Mar. 21. LAWRANCE, J. (3), read the judgment of the Court (Cave and A. L. Smith, JJ.).

This is an appeal against an order of the judge of the county court at Wrexham, granting an order of discharge subject to the condition of the bankrupt's consenting to judgment being entered against him for 250*l.* The facts of the case are as follows: In July, 1885, the bankrupt was defendant in an action for breach of promise of marriage in which the plaintiff recovered judgment for 500*l.* In January, 1886, the bankrupt's father died, leaving behind him personalty valued for probate duty at 2315*l.*, and real property worth 1300*l.* or 1400*l.* more. By his will, made five days before his death, all his children took substantial

(1) 6 Morr. 38. (2) 6 Morr. 224.

(3) The judgment was written by Cave, J.

benefits except the bankrupt, to whom a legacy of 10*l.*, only payable on his mother's death, was left. On April 11, 1889, a receiving order was made against the bankrupt on his own petition. The assets were practically nil, and the only creditor was the plaintiff in the breach of promise action, who proved for 596*l.*, made up of damages, costs and interest on the judgment debt. Shortly before the petition in bankruptcy was filed the bankrupt's family offered the plaintiff 250*l.* in satisfaction of her judgment, which however was refused. Upon these facts the judge gave the bankrupt an order of discharge subject to his consenting to a judgment for 250*l.* being entered up against him, such judgment to be deemed to be satisfied if the bankrupt paid the official receiver 200*l.* within a month.

For the appellant it is contended that the learned judge had no power to take the above facts and circumstances into consideration, and ought to have granted an unconditional order of discharge. Sect. 28, sub-s. 2, of the Act of 1883 provides that, "On the hearing of the application" (for a discharge) "the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property: Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act, or part 2 of the Debtors Act, 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge, subject to such conditions as aforesaid." By sub-s. 6, "The Court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the official receiver or trustee for any balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the Court, which leave may be given on proof that the bankrupt

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has since his discharge acquired property or income available for payment of his debts." Now, looking at this section according to its natural grammatical meaning, it seems clear that the Court is to take into consideration the bankrupt's conduct and affairs, and after such consideration may, in the exercise of a judicial discretion, grant, refuse or suspend the order of discharge, or grant it subject to conditions. Then comes a proviso which in certain cases takes away this discretion and compels the judge to refuse or modify the order: according to its natural and grammatical construction the proviso does not cover the whole of the ground taken up by the first part of the section, and still leaves room, in cases not covered by the proviso, for the exercise of the discretion of the judge. What then is to be understood by the words "conduct and affairs"? We were invited by the appellant to hold that the conduct which can be considered by the judge is limited to the species of conduct referred to in sub-s. 3, and that no conduct outside that sub-section and s. 24 can be looked at. In support of this contention reliance was placed on *Block's Case*. (1) In that case the debtor, after his bankruptcy, had refused to comply with the request of the trustee that he should be medically examined in order that an insurance might be effected on his life with the view of selling a reversionary interest he possessed to the best advantage. It is obvious that unless a duty to comply with such a request is somewhere imposed on the bankrupt a refusal to submit to medical examination is not misconduct, and therefore that it was necessary to find something in the Bankruptcy Act from which it could be inferred that it was the duty of the bankrupt to submit to such an examination. The case turns entirely on the question whether there is or is not such a duty to be inferred, and it was held both in the Court of Appeal and in the House of Lords that no such duty is imposed on the debtor, and, that being so, such refusal was not misconduct within the meaning of s. 28, and consequently not conduct which the judge could consider on the application for a discharge. Our attention was, however, particularly called to certain dicta in that case which deserve our respectful consideration. In the Court of Appeal, Lord Esher

(1) 19 Q. B. D. 39; 13 App. Cas. 570.

remarked that the conduct which is to be taken into account under s. 28 in determining whether the bankrupt should be discharged if it be not one of the matters specified in that section must be something described in s. 24.

The observations of Lopes, L.J. (1), in the same case were also urged upon us. His Lordship says: "In my opinion the word 'conduct' in s. 28 does not include what I call general misconduct. For instance, it could not, I imagine, be said to include immoral conduct, however culpable or however unreasonable. Nor again, in my opinion, would it include a breach of an obligation not connected with the bankruptcy—such, for instance, as a breach of promise to marry, however dishonourable and however unreasonable the conduct of the bankrupt in that respect might be."

In the House of Lords, Lord Macnaghten is reported to have said (2), "The question is, was such a refusal conduct which ought to have been taken into consideration when the bankrupt applied for his order of discharge? That depends on ss. 24 and 28 of the Act of 1883. The case does not fall within any of the cases specified in s. 28. The appellants are therefore driven to rely on s. 24." The argument founded on these dicta was that they established the position that the only conduct of the bankrupt which could be taken into consideration was that specifically described in sub-s. 3 of s. 28. Now, in the first place, this argument gives no meaning to the word "affairs" in s. 28, sub-s. (2). It has been pointed out by Lindley, L.J., in *Bullen's Case* (3), that the condition which may be imposed under sub-s. 6 is not to be imposed as a general punishment for misconduct. His Lordship there says, "There is no evidence at all that the man" (the bankrupt) "will ever have any after-acquired property, and under those circumstances I think primâ facie one ought not to tie a man up by such a judgment" (under sub-s. 6) ". . . a man ought not to be placed in such a position unless something is likely to be gained by it." In these observations, if I may respectfully say so, I entirely concur, and in *Shackleton's Case* (4)

(1) 19 Q. B. D., at p. 47.
(2) 13 App. Cas., at p. 581.
(3) *In re Bullen, Ex parte Arnaud*, W. N. 21 July, 1888, p. 170; 5 Morr. 243.
(4) 6 Morr. 304.

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I endeavoured to express the same idea. But the conclusion I draw from the use of the word "affairs" in s. 28, and from this particular condition in sub-s. 6, is that it was not the intention of the legislature that a man who was not able to pay his debts at a given time, but who had reasonable expectations of acquiring property afterwards, should take advantage of the Act to get rid of his debts on payment of a small dividend, or perhaps none at all, and, by getting an unconditional discharge, put himself in a position to enjoy, without molestation from his creditors, that property which he had every reason to believe would shortly devolve upon him. Let me take the very common case of a man who has reason for thinking that he will take large pecuniary benefits under the will of his father, or an uncle, or some other wealthy relative. Such expectations are very naturally shared by those who are acquainted with his position, and tradesmen and others are ready to give such a man credit in the expectation of being paid when these expectations are realized. If the contention of the appellant is correct, such a man might, after he had enjoyed the benefit of this credit, and when all his creditors were content to wait till these expectations were realized, file his petition in the Bankruptcy Court, and in the absence of fraud demand his discharge without paying his creditors any dividend, thus leaving himself free to enjoy the benefits of his relative's generosity without sharing a sixpence of it with those who had trusted him in the expectation of being paid out of this fund. That such a state of things could be brought about without any actual fraud on the part of the expectant heir is obvious to any one with the least knowledge of the world, and of the way in which credit is given to persons of that class. Take again such a case as that of *Clarkson* (1), where on a consideration of the bankrupt's affairs my brother A. L. Smith and I modified the order of discharge in the manner pointed out by sub-s. 6. It was indeed suggested there that the bankrupt had brought himself within sub-s. 3 because he had pleaded a defence to an action for breach of promise of marriage, which defence he had afterwards withdrawn; but assuming that the plaintiff in an action of breach of promise of marriage is a creditor within sub-s. 3 (*e*), the expense

(1) *In re Clarkson, Ex parte Allestree*, 2 Morr. 219.

the plaintiff was put to by pleading a defence which was afterwards withdrawn could be but small, and substantially the result would have been the same if he had let judgment go against him by default.

In my judgment, therefore, the learned judge was justified in taking into consideration the affairs of the bankrupt; and if on such consideration he came to the conclusion that the bankrupt would probably come into possession of property in the future, and had presented his petition in order that he might get rid of this creditor first and enjoy his subsequently-acquired property without having to pay any portion of this debt, it was within his power to make the order which he has done. In my opinion, looking at the offer to pay 250*l.*, which was made shortly before the petition was presented and to the circumstances and position of the bankrupt, the judge was justified in coming to that conclusion, and I have very little doubt that the 250*l.* will ultimately be paid.

These considerations are sufficient to dispose of this appeal; but I should like to add a few words with reference to the dicta in *Block's Case* (1), above cited, because in some quarters (2) they have been taken as amounting to a decision that the "conduct" referred to in sect. 28 must be confined to the instances of misconduct specified in sub-s. 3, or in s. 24. Now the subject of complaint in *Block's Case* (1) was that the bankrupt had refused to submit to a medical examination which the trustee desired him to submit to in order that he might insure the bankrupt's life. This was conduct of a negative character, and in order to establish that such a refusal is misconduct, it is necessary to shew that the bankrupt is by law required to do the thing which he has refused to do. The only sections which were referred to for this purpose were ss. 24 and 28. Sect. 28, sub-s. 2, refers to particular kinds of misconduct enumerated in sub-s. 3. Sub-s. 7 prescribes the conduct of the bankrupt after his discharge. Sect. 24 imposes certain duties on the bankrupt with reference to giving information to the trustee and the creditors, and aiding

(1) 19 Q. B. D. 39; 13 App. Cas. 570.

(2) See the head-note in *In re Betts & Block, Ex parte The Board of Trade*, 4 Morr. 170, and Baldwin's Law of Bankruptcy, p. 466, note (5).

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in the realization of his property and the distribution of the proceeds among the creditors. According to the view of the majority of the Court of Appeal and of the House of Lords respectively, neither of these sections required the bankrupt to submit to a medical examination, and therefore he was not guilty of any misconduct within s. 28. This view of the subject amply explains all that was said by Lord Macnaghten, and leaves only the dicta of the Master of the Rolls and Lopes, L.J., to be dealt with. The legislature has nowhere expressly defined what is the "conduct" which is to be considered under s. 28, sub-s. 2. To my mind it is quite impossible to hold that the proviso in that sub-section is co-extensive with the first part of the sub-section; for if that were so, and if no conduct could be considered except such as is specified in sub-s. 3, it would necessarily follow that misconduct coming within s. 24 could not be considered, nor yet conduct coming within s. 29, which, however, by the express language of the Act, is to be considered. There is therefore, necessarily, conduct to be considered other than that specified in sub-s. 3, and it is conduct which the legislature has considered may be dealt with by a lighter punishment than the conduct specified in sub-s. 3, for the legislature has invested the judge with more discretion with regard to it. Of course the word "conduct" must have some limitation. It cannot apply to the man's behaviour from the time he became responsible for his actions down to the day of the hearing. As was held in *Brockelbank's Case* (1), the conduct referred to must be conduct connected with or arising out of the bankruptcy. So far as I can judge, that is all that Lopes, L.J., meant to say in that part of his judgment in *Block's Case* (2) which has been cited above. Of what nature is the conduct specifically referred to in sub-s. 3? It is conduct of various kinds connected with the bankruptcy, as for instance in the case of a trader neglecting to keep proper books, or continuing to trade after he knew himself to be insolvent, or in the case of any bankrupt contracting a debt without reasonable prospect of payment, bringing on the bankruptcy by blameable speculation or extravagance, putting a creditor to expense by a frivolous or vexatious defence to an action, undue

(1) 6 Morr. 138. (2) 19 Q. B. D. 39; 13 App. Cas. 570.

preference, former bankruptcy, fraud or fraudulent breach of trust. It is difficult to reduce these kinds of conduct to any general head. They are all connected with the bankruptcy under investigation except (*g*), which refers to a previous bankruptcy or arrangement with creditors. They are all acts of commission except (*a*) the omission to keep proper books of account. Let us suppose that the bankrupt has been guilty of conduct analogous to that referred to in sub-s. 3, and injurious to his creditors in the same kind of way, is he nevertheless to be entitled as a matter of right to an absolute order of discharge? Suppose it were proved that the bankrupt had caused his clerks to keep the books required by clause (*a*), but had neglected to look at them, and therefore had continued to trade after he was insolvent without knowing himself to be so, or suppose that he had not brought on but had contributed to the bankruptcy by rash and hazardous speculation or unjustifiable extravagance in living, or had brought on his bankruptcy by gambling, or by culpable neglect of his business, or that he had put any of his creditors to unnecessary expense by bringing a frivolous or vexatious action or counter-claim against him, or that he had dissipated his assets by making payments which were undue preferences within s. 48, but not within sub-s. 3 (which substitutes a different starting-point for the three months to run from), or which would have been undue preferences if the petition had been presented three days earlier, or (to take a case not so cognate to the cases in s. 28 as those already given) that the bankrupt's assets were insufficient to pay any dividend, or that there had been a very large loss or disappearance of assets shortly before the bankruptcy, which the bankrupt had failed to account for satisfactorily. Surely it cannot be that in all these cases the bankrupt is entitled to insist upon an unconditional and immediate discharge as soon as his public examination is concluded. None of these considerations were before the Court of Appeal in *Block's Case* (1). The Court was not dealing with blameworthy acts of commission which had brought on the bankruptcy or had caused any creditor to trust the bankrupt, or which had squandered the assets before they were handed over to the trustee. It was dealing with a

(1) 19 Q. B. D. 39; 13 App. Cas. 570.

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refusal to do an act after all the assets had been handed over to the trustee, and which in the opinion of the majority of the Court was a refusal to do something which had no relation to his property or to the distribution of it, and therefore it was necessary to find either in s. 28 or s. 24 an express or implied prohibition of such conduct, or, at all events, of conduct of an analogous nature; and as the Court of Appeal and the House of Lords held no such express or implied prohibition is to be found, I need hardly say that I accept unhesitatingly the decision of the House of Lords in *Block's Case* (1), which, indeed, affirms in effect a decision of my own; but I do not think that the dicta referred to have the wide import which has been attributed to them, because I believe that the Master of the Rolls and Lopes, L.J., had before them very different considerations than those which I have been discussing above.

The appeal must be dismissed with costs.

Solicitors for appellant: *Rooke & Sons.*

Solicitor for official receiver: *The Solicitor of The Board of Trade.*

J. R.

March 10.

[IN THE COURT OF APPEAL.]

DAVIES & CO. *v.* ANDRÉ & CO.

Practice—Action against a Firm — Appearance—Conditional Appearance—Order IX., *rr.* 6, 7; *Order* XII., *rr.* 13, 15, 16; *Order* XLII., *r.* 10.

There is no power under the Rules of the Supreme Court, in an action against a firm, to allow the entry of a conditional appearance, i.e., an appearance by a person which denies that such person is a partner in the firm.

APPEAL by the plaintiff from the order of Field, J., at chambers, allowing an appearance in the action by one Rath, in manner hereinafter appearing.

The facts and arguments sufficiently appear from the judgment.

Lawson Walton, for the appellant, the plaintiff.

Terrell, for the respondent Rath.

Cur. adv. vult.

(1) 19 Q. B. D. 39; 13 App. Cas. 570.

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Feb. 12. The judgment of the Court (Denman and Wills, JJ.) was delivered by

WILLS, J. In this case, the plaintiff, W. H. Davies, trading as W. H. Davies & Co., sues a firm of the name of André & Co. for a balance of account in respect of goods supplied to that firm from October, 1888, to March, 1889.

The writ is addressed to André & Co., of 8, Ribblesdale Place, Hornsey. It bears an indorsement dated 2nd November, 1889, in the following terms: "This writ was served at 8, Ribblesdale Place, Hornsey, on the defendants, by leaving same with a person in charge of business on Friday, 1st November, 1889. Signed, F. Sydney Searle."

The memorandum contains a contradiction in terms, and no doubt the writ was really served by leaving a copy at 8, Ribblesdale Place.

On the 8th November (leave having been obtained from a master), an appearance was entered in these words: "Enter a conditional appearance for Ferdinand Rath, having been served as a partner, but who denies that he is a partner in the defendant firm of André & Co. Signed, Vallance & Co., solicitors for the said Ferdinand Rath."

A summons was heard by Field, J., on December 4, to strike out this appearance. No affidavits appear to have been used on this occasion. The learned judge made the following order: That the appearance entered by Ferdinand Rath in this action be amended by striking out the word "conditional" and the words "but who denies that he is a partner in the firm of André & Co."

On the same December 4, Ferdinand Rath delivered a statement of defence, headed, "Between W. H. Davies & Co. and Ferdinand Rath, sued as André & Co.," in which he denied that he ever carried on business as André & Co., or was a partner in that firm, or bought the goods, or any of them, or had any of the transactions mentioned in the statement of claim indorsed on the writ.

Notice of appeal was given on behalf of the plaintiff, asking that the said order be reversed or varied and that the said appearance may be struck out.

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On the hearing of this appeal before us, three affidavits were used.

The first, sworn on January 21, 1890, is by Searle, a clerk to the plaintiff's solicitors, the person who served the writ.

He says that he went to 8, Ribblesdale Place, where he was informed that André & Co. carried on business and which is the place mentioned in the writ, that he saw a person who told him he was Mr. Rath, and "who appeared to me to be in charge of the business." He served Rath with a copy of the writ. Rath, he says, told him he was not a partner; and in reply, as Searle alleges, he told Rath, that he had served him with the writ as being the representative of the firm of André & Co., and as having the control or management of the partnership business there.

The next affidavit is one by Rath, sworn on January 30. He answers Searle's affidavit, and says that the information given to Searle that André & Co. carried on business at 8, Ribblesdale Place, is wholly untrue: that that house has for fifteen years been occupied by Rath and his family, and no business of any kind has ever been carried on there by any one. He says that on being served he told the person making the service that he was not in any way connected with, nor a partner in André & Co., and that the answer given was that he was the right person on whom to serve the writ. He adds that he immediately wrote a note on the copy writ to the effect that he was not in any way connected with the firm of André & Co., and sent it back to the plaintiffs' solicitors, and afterwards entered the conditional appearance, being afraid that an execution would be levied on his property in his private house.

He says that his brother-in-law, Rudolph Andrei Koits, carried on business for several years as André & Co. in Piccadilly, and beyond the fact that Koits is related to him he knows nothing of the firm or its business. He swears that he is not in fact a partner in the firm, nor in any way connected therewith.

To this affidavit the plaintiff has replied by an affidavit sworn on the same January 30. He says: "I have received messages through my employés from the firm of André & Co. and carrying on business at 8, Ribblesdale Place. My traveller has also fre-

quently called at that address for payment, when, as I have been informed by him and believe, he has seen both Rath and his wife, who have at various times, as representing André & Co., made promises of payment of my account." He exhibits a letter from Rath dated 8, Ribblesdale Place, April 3, 1889, in which he says, "I send you the following goods for your inspection," a list being given. "I also enclose rates of goods I had, and which were not sold and good as memo." The enclosures were memoranda dated April, 1889, on two printed billheads of André & Co. bearing the address 207A, Piccadilly. They are addressed to the plaintiffs. Both have the word "bought" struck out from the printed line, "Bought of André & Co."; one has written in place of the erasure, "goods returned," the other "goods memo. returned by." The affidavit goes on, "Both Rath and his wife have called and seen me at my business premises and represented themselves as calling on behalf of André & Co. Rath has also purchased and ordered goods of me, and he has called on several occasions respecting my account against André & Co., and promised payment thereof. During my transactions with André & Co. I have received several letters from them, and they are in the handwriting of Rath, though signed in the name of André & Co."

From these affidavits we conclude that the writ was served on Rath without any definite information to him in what capacity he was served, and that the indorsement was made after the copy writ left with Rath, and returned by him, had reached the plaintiffs' solicitors.

We also conclude that at the time of the service of the writ André & Co. had ceased to carry on business in Piccadilly; that some business at least was being done from 8, Ribblesdale Place, though it might be a private house, and that the plaintiff had reason in the conduct of Rath for believing that Rath was either a partner in André & Co. or their agent; that the circumstances bring the service within the terms of Order IX., r. 6, as being "either upon one of the partners or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of the service the control or management of the partnership business there:" and that the service was a good service upon André & Co. We think also that, although Rath

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had no means at the time when he entered the appearance of knowing in what capacity he was served, the service must be treated until and unless it is established that he is a partner, as having been made upon him as having control of the partnership business.

We pass to the consequences of such service.

By Order XII., r. 15, where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall nevertheless continue in the name of the firm.

By the same order, rule 16, where any person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the name of the firm, he shall appear in his own name, but all subsequent proceedings shall nevertheless continue in the name of the firm.

Any person, therefore, who appears unconditionally to a writ addressed to a firm admits either that he is "sued as a partner" or that "he is carrying on business in the name" of the firm sued. Where, as in the present case, he is not told by the plaintiff that he is sued as a partner, to appear as a person sued as a partner is to confess that he is a partner, and therefore under rule 15 in circumstances like the present, and under rule 16 in any case, no man can appear at all, if he appear unconditionally, without admitting that he is a partner. If he is willing to do that, he can then defend the action and may dispute the debt in whole or in part, and judgment will go against the firm for the amount if any really due. Execution may then go against the person who has so appeared under Order XLII., r. 10.

If, again, a person who has been served with the writ, and served as a partner, appears in his own name, he can dispute the fact of partnership as well as the amount of the debt, and the latter part of Order XLII., r. 10, seems to be expressly framed to meet such a case. He will have been adjudged a partner, if the verdict go against him upon this point, and he will have had the opportunity of contesting the debt, and justice will be done.

And so again, if a person so served fail to appear, judgment will properly go against him. He has been served as a partner, and has had notice both of the amount alleged to be due and of

the allegation that he is a partner. If he chooses to contest neither point, execution rightly goes against him.

But if he is not served as a partner, he is in this position. If he comes forward and appears, he treats himself as being sued as a partner, which is equivalent to admitting that he is one. If he does not make this admission, he has no right to appear at all, and even if he does make the admission, it is doubtful whether he falls within the rules we have cited, inasmuch as he has not been sued in that capacity. Not being entitled to appear, he cannot prevent judgment going against the firm by default for the full amount claimed; and then, when the plaintiff under Order XLII., r. 10, alleges that he is a partner, though not served or sued as one, he is too late to dispute the amount of the judgment. He may have the question of liability tried, but not that of amount; and the penalty of having failed to admit at the outset that he is a partner is that he may have to pay a debt never due at all, or which was really far less than the amount of the judgment.

This might be all very well, if all persons who deny that they are partners when they really are partners were dishonest, though even then the infliction of such a penalty would not be consonant with the wide liberty given to a defendant in all ordinary cases to deny the case of the plaintiff. But there is no more difficult question of fact and law than those which occasionally arise as to the fact of partnership; witness the well-known case of *Cox* v. *Hickman*. (1) It cannot be right that a person against whom a plaintiff may ultimately claim on the score of his being a partner in the firm sued can be heard to dispute the amount of the claim only on the terms of admitting his partnership, or to dispute his partnership only on the terms of being shut out from questioning the amount. It is quite clear from what passed in the argument before us that the plaintiff has no notion of releasing Rath from personal liability, and that, although he objects to the interposition of Rath to prevent him from getting judgment by default against André & Co., he reserves the right of proceeding against him under Order XLII., r. 10, by way of execution, and he claims to be in a position to call upon Rath, as soon as

(1) 8 H. L. C. 268.

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judgment is signed, to discharge as a partner a claim which he now says he ought not to be allowed to contest, because the plaintiff is not suing him as a partner.

We think the dilemma is one calling for the attention of the Rule Committee. What seems needed in the way of alteration is, that, when leave to issue execution is sought under Order XLII., r. 10, the judge should be able to grant to the person sought to be affected, upon such terms (if any) as he shall think fit, leave to dispute the claim as well as the fact of partnership. But in the meantime the rules stand as they are, and we must endeavour to prevent injustice from being done. If, notwithstanding appearances, which are against him upon this point, Rath really knows nothing of the transactions in respect of which this action is brought, he ought to be allowed to dispute both the partnership and the existence or amount of the alleged debt. Whether or not the allegation that he is unconnected with the firm is true is a question which cannot be settled upon the affidavits. On the other hand, if the plaintiff does not seek to hold Rath liable as a member of the firm, there is no reason why Rath should interfere with the right of the plaintiff to have judgment against the firm.

If, therefore, the plaintiff is willing to undertake that he will not seek to issue execution against Rath as being a member of the firm, the appearance will be struck out, and the plaintiff may sign judgment against the firm. In that case we think Rath ought to have his costs of this application.

If the plaintiff is not prepared to give the undertaking, we see no course but to restore the conditional appearance with a modification of its terms and to direct an issue as to the question of partnership, the costs of this application, of the application to the master and of the summons before Field, J., and the costs of the issue to abide the event of the issue, the form of the conditional appearance being, "Enter a conditional appearance for F. Rath, who, unless the plaintiff will undertake not to seek to hold him liable as a partner in the firm of André & Co., desires to appear though denying that he is a partner or that he carried on business under the name of André & Co." If, in the result, Rath should be found to be a partner, the conditional appearance

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will be struck out, and he will have leave to appear as a partner. If he should be found to be not a partner, then the appearance will be struck out, and plaintiff will have judgment against André & Co. It may be that this is an extension of the procedure by way of conditional appearance. If it be so, however, it is one rendered necessary in the peculiar circumstances of this case by the impossibility under the rules of doing justice otherwise. The statement of defence is clearly wrong, and must be struck out; Rath has no right to alter the title of the action. The proceedings, under the rules, must be continued in the name of André & Co. as defendants; and the statement that he is not a partner is nihil ad rem, he not having been served or sued as a partner.

It was objected on behalf of Rath that when judgment is obtained against the firm of André & Co., he might, under Order XLII., rule 10, have an execution levied on the property in his house, as partnership property. This is an inconvenience that might happen to any person. The sheriff may make a mistake in respect of any one's property, and Rath has no claim upon this score to any special consideration.

Order accordingly.

Against this order the plaintiff appealed.

Mar. 10. *Cock, Q.C.*, and *A. D. Maclaren*, for the appellant, the plaintiff. The order of the Divisional Court was wrong. There is no provision under the rules for the entry of a conditional appearance, as they have ordered. The appearance, as entered, ought to have been struck out. The writ, as the Divisional Court decided, was not served on Rath as a partner, but there was service, as provided for by Order IX., rr. 6, 7, in the case of an action against a firm, by service upon Rath as the person having control of the business. In that case the persons who are partners, or the person who carries on business in the name of the firm, must appear individually in their or his own names or name (Order XII., rr. 15, 16), or, if no appearance be entered, judgment goes by default against the firm; but a person who denies that he is a partner has nothing to do with the action; he certainly cannot be entitled to enter an appearance conditionally;

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and so prevent the plaintiff from getting judgment against the firm, while denying that he is a member of the firm. The plaintiff has duly served the firm by serving a person in control of the business, and wants judgment against the firm. He ought not to be hampered and prevented from getting judgment against the firm by having, at this stage, to try an issue whether a person who denies that he is a partner is one or not. It will be time to try that issue if and when, under Order XLII., r. 10, a question arises of issuing execution against Rath.

H. E. Duke, for the respondent Rath, argued in support of the decision of the Divisional Court, and referred to the case of *Cram* v. *Paynter* (cited in Annual Practice, 1888–89, p. 231, note to Order XII., r. 16). (1)

LORD ESHER, M.R. In this case a writ was issued against a firm. That writ was, in fact, served upon one Rath. If the writ were served on him as a partner, his course was to appear, and, after having appeared, he could make the defence that the firm did not owe the debt, or, if it did, he was not a partner in the firm. If he were served as a partner and no appearance were entered, judgment would go against the firm, and he could not then be allowed to say that he was not a partner, and execution would go against him. If in this case the writ must be taken to have been served on him as a partner, he ought to have appeared. He only partly appeared. He entered a conditional appearance. No such appearance is allowed by the rules. He must either appear or not appear; and, if there is no valid appearance, and judgment is signed against the firm for default of appearance, he cannot then deny that he is a partner. It seems to be more in his favour to treat the service, as the Queen's Bench Division did, viz., as having been not upon him as a partner, but through him as a person in control of the business. But so treated, it is not service on himself, but on the firm. He is, in that case, the mere figure-head or representative of the firm for the purpose of service. What is his proper course in such case? If he is a

(1) It has not been thought necessary to set out the argument for the respondent at length, because substantially the points relied on appear from the judgment below.

partner, he should appear. There is no rule which says that he may half appear. He must make up his mind, and, if he says he is a partner, he must appear as such. If he says that he is not a partner, he must leave it alone. Then, if no one enters an appearance, judgment may go against the firm by default, but he is not as yet thereby affected. If the plaintiff wants to issue execution against him, he must shew that he is a partner. The scheme of the rules is that in such case any partner may appear, but he can only appear as a partner. If a person says he is not a partner, he must not appear. If he does not appear, he cannot contest the debt as being due from the firm. But, if the plaintiff afterwards says that he is a partner, the plaintiff must take the necessary steps under Order XLII., r. 10, to prove that he is in order to get execution against him. Then, if he is proved to be a partner, it is his own fault that he did not appear. He made his election, and must take the consequences. The learned judges below thought that injustice might arise. They thought that a man might not altogether know whether he was a partner or not. That so seldom really happens, as the law now stands, that I think that difficulty may be passed over. But however that may be, and assuming that injustice might be produced, the conclusion would be that the rules must be altered. There is no rule that fits the case. It seems to me that the learned judges below created one out of their own heads. I must say that, if a new rule were proposed to be made, at present I should feel a difficulty in seeing that it was necessary. For these reasons I think that the appeal should be allowed, and the appearance struck out.

FRY, L.J. I am of the same opinion. It is, no doubt, the duty of Courts and judges, as far as possible, to mould the procedure so as to meet the exigencies of cases; but it seems to me that what the learned judges below have done in this case altogether goes beyond the provisions of the rules. The general scheme of the rules in actions against partnerships is as follows. The proceedings are commenced against the firm. Then there are various modes of service provided; and persons to whose knowledge the writ is so brought, if partners, must appear as such, or allow judgment to go by default; but, if not partners,

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then they have nothing to do with the matter. The judges below seem to have thought that there was a third class of persons, viz., those who do not know whether they are partners or not. For my part, if there be such a class, I should not have much sympathy with them. It is a matter about which people ought to be clear. The intention of the rules is that judgment may go against the firm; and execution of such judgment is to be had in the manner specified by Order XLII., r. 10. That rule provides that execution may issue against property of the partnership, or against persons who have appeared in their own names under Order XII., r. 15, or who have admitted on the pleadings that they are partners, or have been adjudged to be such, or against persons who have been served as partners, and have failed to appear; but, if the plaintiff seeks to issue execution against any other person, he must apply for leave to do so. On that application, such person can come in and defend himself. If Rath is right in saying that he is not a partner, he has no need to appear. He has no interest in the question whether judgment is to go against André & Co., because his goods never can be taken in execution on such judgment. In my opinion, all that justice requires is provided for by the rules. The learned judges below appear to me to have elaborately framed a scheme for trying the issue whether the respondent was a partner before the right time had arrived. The right time to try that question is when the plaintiff says that he is a partner.

Appeal allowed. (1)

Solicitors for the appellant: *Learoyd & James.*
Solicitors for the respondent: *Vallance & Co.*

E. L.

(1) Leave was given to Rath to enter an appearance in the ordinary way within ten days, if so advised.

REG. *v.* J. BRIDGE, Esq. (Metropolitan Police Magistrate). 1890 *Feb.* 5.

Metropolis Management Acts—Metropolis Management Act, 1855 (18 & 19 *Vict.* c. 120), *s.* 129—*Scavengers—Removal of "refuse of trade"—Decision of Magistrate "final and conclusive"—Appeal by Special Case under Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Question of Law.*

By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 129, if any dispute arise between the owner or occupier of a house or land and the scavengers required to remove certain refuse, it shall be lawful for two justices ". . . to determine whether the subject-matter of dispute is or is not refuse of trade, manufacture or business . . . and in every such case the decision of such justices shall be final and conclusive." By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, "any person aggrieved who desires to question a conviction, order, determination or other proceeding of a Court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the Court to state a special case . . . . and if the Court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated."

A police magistrate, acting under the Metropolis Management Act, 1855, s. 129, decided that certain ashes from the furnaces of an hotel were not "refuse of trade" within the section, and declined to state a case on the ground that the decision was "final and conclusive" and no point of law arose:—

Held, that, in the circumstances, there was a question of law upon the construction of s. 129, and that the magistrate was not entitled to refuse to state a case.

Order calling upon a Metropolitan Police Magistrate and Frederick Gordon to shew cause why the magistrate should not state and sign a case for the opinion of the Court.

An information and summons was issued by Frederick Gordon against the Vestry of St. Martin-in-the-Fields, under the Metropolis Management Act (18 & 19 Vict. c. 120), s. 129, there being a difference of opinion between the vestry and Frederick Gordon as to certain refuse to be taken from the Hôtel Métropole, to determine whether the subject of dispute was or was not refuse of trade or business.

At the hearing it appeared that the proceedings were taken on behalf of the proprietors of the hotel. Three engine boilers at the basement were used in order to obtain steam power for heating the hotel, supplying electric light and other purposes. The vestry refused to remove the ashes from the furnaces of the

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boilers unless paid for the removal. The magistrate decided that these ashes were not trade refuse.

An application was made to him to state a case. The magistrate certified that he declined to state such a case on the ground (1) that by s. 129 of 18 & 19 Vict. c. 120, his decision in the matter was made final and conclusive and (2) that no point of law arose in the case.

Crump, Q.C., (*Bankes* and *Munro*, with him), shewed cause. First, by the Metropolis Management Act (18 & 19 Vict. c. 120), s. 129, in any dispute as to what shall be considered as refuse, it shall be lawful for two justices "to determine whether the subject-matter of dispute is or is not refuse of trade, manufacture or business . . . and in every such case the decision of such justices shall be final and conclusive." The police magistrate has the power of two justices. His decision was "final and conclusive." That special enactment was not repealed by the general provision of 20 & 21 Vict. c. 43, s. 2, for stating a case after the determination of any information or complaint summarily, or by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, whereby "any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the Court to state a special case . . . . and if the Court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated."

Secondly, no point of law has arisen upon which a case should be stated. The question whether the ashes to be removed are "trade refuse" is one of fact. The words are not terms of art, but in common use.

R. G. Glenn, in support of the order. The question whether the ashes are "refuse of trade or business" is one of law. See *Gay* v. *Cadby* (1), a decision on s. 128 of the Metropolis Management Act.

The whole refuse of an hotel is "trade refuse." These ashes from a furnace are not "ashes" within ss. 125, 126, 127. They

(1) 2 C. P. D. 391.

are no nuisance, and the vestry is not bound to remove them gratuitously. At the time when the Metropolis Management Act, 1855, was passed there was no power in the magistrate to state a case, and therefore the legislature could not have contemplated an appeal by case stated. The words "final and conclusive" mean only that the determination shall be binding as between the same parties and prevent them from raising the same question again. But the terms of the Summary Jurisdiction Act, 1879, are comprehensive, and confer a right on "any person aggrieved" to question any "determination or other proceeding of a Court of summary jurisdiction on the ground that it is erroneous in point of law." The legislature might have excluded the provisions of s. 129 of the Metropolis Management Act from the operation of the Summary Jurisdiction Act, 1879, but did not do so, and presumably intended that it should apply. [He was stopped.]

FRY, L.J. I think that a case should be stated. No doubt when the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), was passed, the decision of the magistrate was final. But the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, is a general enactment that "Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the Court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the Court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated." Previously, in a large number of cases, the decision of the magistrate was final, and without appeal. The intention of the legislature was that, in future, on questions of law, and questions which might arise as to the jurisdiction of the magistrate, the party aggrieved should have a right of appeal. There is no inconsistency in holding that the Summary Jurisdiction Act, 1879, has so far modified the Act of 1855 as to give a right to have a case stated where none could have been stated under the Act of 1855 if it stood alone. Secondly, it is argued

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that no point of law arises; but I think that a point of law does arise. The real controversy between the parties was upon the interpretation of the Act; there was no dispute as to the nature of the subject-matter of the complaint, or as to the place from whence it came—the dispute was whether the subject-matter was "refuse of trade or business." Questions of law also arise as to whether the material, the nature of which was undisputed, comes within the meaning of the words used in the Act, "refuse of trade," or "ashes," whether the provision as to "refuse" is an exception in the clauses with respect to "ashes," and whether, supposing the material to be "ashes," the vestry is bound to remove it without payment.

MATHEW, J. I am entirely of the same opinion. The question arises upon the construction of the Act, from which we must gather the meaning of the legislature. That is, in one sense, a question of fact; but it is a question of fact to be determined by the Court, and is therefore one in respect of which an appeal is provided for by the Summary Jurisdiction Act. The magistrate must state the facts in a case to enable us to ascertain whether his decision was right or wrong.

Order absolute.

Solicitors for applicant: *Fladgates.*

Solicitors for respondent: *Ingram, Harrison & Ingram.*

J. R.

[IN THE COURT OF APPEAL.]

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Feb. 14.

IN RE PERKINS. EX PARTE MEXICAN SANTA BARBARA MINING COMPANY.

Bankruptcy—Bankruptcy Petition—Secured Creditor—Obligation to give up or value Security — Company — Debt due from Shareholder — Lien on Shares—Equitable Owner of Shares—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 6, 168.

Upon the hearing of a bankruptcy petition presented by a limited company it appeared that the debtor had obtained judgment against one of the registered shareholders of the company, declaring that he was a trustee of some of his shares for the debtor. The articles of association of the company provided that the company should "have a first and paramount lien on all shares for all moneys due to the company from the registered holder thereof, or other the persons for the time being entitled thereto as against the company":—

Held, that, as the company were not bound to recognise trusts of their shares, the debtor was not a person "entitled to the shares as against the company," and, consequently, that they had no lien upon the shares for the debt due to them from him, and were not "secured creditors" of the debtor within the meaning of the Bankruptcy Act, 1883.

APPEAL against the dismissal of a bankruptcy petition presented by the Mexican Santa Barbara Mining Company.

The company stated in their petition that they did not hold any security on the debtor's estate, or on any part thereof, for the payment of the debt in respect of which the petition was presented. The objection was taken that the company did in fact hold security for their debt, and the registrar held upon the evidence that they did, and required them to amend the petition by stating that they held security, and, in accordance with s. 6 of the Bankruptcy Act, 1883, by stating that they were willing to give up the security for the benefit of the creditors of the debtor, or putting a value on it. The company declined to do this, and the registrar dismissed the petition.

The debt in respect of which the company petitioned was incurred under the following circumstances: One J. M. Dickey was the registered holder of a number of shares in the company, and the debtor commenced an action in the Queen's Bench Division against Dickey, the company, and another defendant, claiming from Dickey certain shares and debentures of the company.

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On April 8, 1889, judgment was given in this action, whereby it was declared that Dickey was "trustee in stock or shares for three-fifths of the agreed partnership share of profits of which Dickey was entitled to one-fifth, and J. B. Coule, for whom Dickey was and is acting, to the remaining one-fifth." And it was adjudged that the plaintiff "recover against the defendant Dickey shares and debentures in the Mexican Santa Barbara Mining Co. amounting to 23,408*l.*, and costs to be taxed." As against the company the action was dismissed with costs. The company's costs were taxed at 129*l.* 3*s.* 9*d.*, and this was the debt on which the bankruptcy petition was founded.

Dickey had, in fact, on May 15, 1888, executed transfers to other persons of all the shares in the company which stood in his name, but the company refused to register these transfers, on the ground that Dickey was indebted to them.

The company's articles of association contained the following clauses:—

"16. The board may, without assigning any reason, decline to register any transfer of shares made by a member who is indebted to them, or, so long as the amount of the shares has not been fully called up, to a person not approved by them."

"20. The company shall have a first and paramount lien on all shares, and on the dividends thereon, for all moneys due to and liabilities subsisting with the company from or on the part of the registered holder or holders thereof, or other the person for the time being entitled thereto as against the company, either alone or jointly with any other person or persons, including calls for which resolutions shall have been passed by the board, but which may not have become due and payable, and may enforce such lien by forfeiture and sale of the shares on which such lien may attach."

The Registrar held that, by reason of the lien which the company had on the shares as against Dickey, they were "secured creditors" within the meaning of the Act.

The company appealed.

Yate Lee (*Barnes, Q.C.*, with him), for the company. The company are not "secured creditors" of the debtor within the

meaning of (1) ss. 6 and 168 of the Bankruptcy Act, 1883. Clause 20 of the articles of association does not give them any lien on the shares as against the debtor. The company are not bound to recognise trusts of their shares; they are entitled to recognise only the legal owner in whose name the shares are registered. The debtor is not, within the meaning of clause 20, "a person entitled to the shares as against the company." Dickey is the legal owner of the shares, and the company have no lien on the shares in respect of a debt due to them from the debtor. Moroever, as Dickey had, before the judgment which declared that he was a trustee for the debtor, executed and lodged for registration transfers to third persons of all his shares, there were no shares upon which the judgment could operate in favour of the debtor.

Poley, for the debtor. The debtor is in equity the owner of the shares of which Dickey has been declared to be a trustee for him, and therefore clause 20 of the articles gives the company a lien on that equitable interest for the debt which the debtor owes them. The transfers of his shares executed by Dickey to other persons, not having been registered, give to those persons only an inchoate title to the shares, which is not sufficient to defeat the equitable title of the debtor: *Roots* v. *Williamson*. (2)

Yate Lee, in reply.

LORD COLERIDGE, C.J. This is a bankruptcy petition presented by the Santa Barbara Company against the debtor, and it is founded upon a judgment debt of 129*l*. In their petition the company stated that they held no security for their debt upon the debtor's estate, and the answer was that they were really secured creditors of the debtor, because he was the cestui que trust of certain shares in the company which stood in the name of one Dickey, and that, as between himself and Dickey, the

(1) Sect. 6 provides: "(2.) If the petitioning creditor is a secured creditor, he must, in his petition, either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security."

By s. 168: "'Secured creditor' means a person holding a mortgage, charge, or lien, on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor."

(2) 38 Ch. D. 485.

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debtor had a right to a transfer of those shares. If the shares were transferred to him they would greatly overtop the debt which he owed to the company, and by their articles of association the company were entitled to a lien upon shares in respect of a debt due to them from the shareholder. This was the ground, as I understand it, upon which the registrar refused to make a receiving order.

I am unable to agree with the registrar's view upon two grounds. In the first place, it seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relations between trustees and their cestuis que trust in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register. It seems to me that, if we were to throw any doubt upon that rule, we should make the carrying on of their business by joint stock companies extremely difficult, and might involve those companies in very serious questions, and the ultimate result would be anything but beneficial to the holders of shares in such companies themselves.

I think, therefore, that, although there may have been transactions which, if they were settled as between Dickey and his cestui que trust Perkins, would give the latter rights as against the company, yet, till those transactions have been settled, and so long as Dickey and Perkins remain in the situation of trustee and cestui que trust, those transactions cannot be treated by the Court as creating any relation between the company and the debtor, which the company were bound to regard.

The second ground arises, as I think the Master of the Rolls has already pointed out, on the very words of s. 168 of the Bankruptcy Act. If the company have any security at all, it is a lien upon the shares held by Dickey, and s. 168 says that "'secured creditor' means a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." Here the lien of the company, which is their only security, is upon the shares standing in

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the name of Dickey, and it is sought to make that lien a security for a debt due to the company, not from Dickey, but from the debtor. Now the shares are not, so far only as the company can regard them, the property of the debtor, and they cannot therefore be security for a debt due from him to the company; they may be security for a debt due to the company from Dickey; but with that security we have nothing to do now.

It seems to me, therefore, that the registrar was wrong in refusing to make a receiving order, and on those two short grounds his judgment must be reversed.

LORD ESHER, M.R. The company presented a bankruptcy petition against the debtor, on the ground that he owed them a debt of 129*l.*, which he had neglected to pay. His answer to the petition is, "It has been decided by a Court of competent jurisdiction that I am in equity entitled to a certain number of shares in the company, the value of which greatly overtops the company's claim for 129*l.* It has been declared by that Court that I am the cestui que trust of those shares, and that Dickey is a bare trustee of them for me."

In answer to that the company say, first, "You may be the cestui que trust of these shares; a Court of competent jurisdiction may have declared that you are; but we know nothing about you; we are legally entitled to take no notice of you, and we have a right to treat you as if you were not a cestui que trust, and, although you may have a right which in some way or other you can enforce to become a shareholder in the company to the extent of 23,000*l.*, we are entitled to make you a bankrupt if you do not pay the 129*l.*" In the second place, the company say, "Dickey, who is said to be your trustee, owes us money, and we have therefore a lien on the shares which stand in his name, and we insist on that lien." The debtor replies, "If you have a lien on the shares as against Dickey, you are secured creditors, and you must either value your security or give it up for the benefit of the creditors." To this the company answer, "That lien does not make us secured creditors of you, Perkins, within the meaning of s. 168 of the Bankruptcy Act, 1883."

With regard to the first point, I confess I have had a great

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desire to overrule it if I could, because to say to a man, "We admit that you are a cestui que trust of the shares; we admit that the man in whose name they stand is a bare trustee for you; we admit, therefore, that you must ultimately be entitled to shares in our company to a large amount; nevertheless, we have a right to make you a bankrupt for a much smaller sum" —does seem to me a very strong thing. But it is said that the company have a legal right to do this, because it is necessary for the protection of companies that they should not be bound to recognise trusts affecting their shares. So far as I understand the law, now that I have fully considered it, it does give the company power to do this. Therefore, the first ground of objection to the bankruptcy petition fails, because the first step which the debtor must take is, to shew that he is a cestui que trust of the shares. The law has given the company the right to say, "We do not care whether you are a cestui que trust or not; if you are, we have a right to take no notice of you." I agree that is the law, though I think it is hard law; but we have nothing to do with the question of hardship.

Then comes the other question, which was the ground of the judgment of the registrar. I doubt whether the first point was really argued before him; at any rate, it was not the point upon which he based his judgment. He held that the company had a lien as against Dickey upon the shares which stood in his name. In virtue of that lien the company declined to consider the claim of the debtor upon the shares. If the matter had stood upon the Bankruptcy Act of 1869, I should have been very much inclined to say that that lien was a security in the hands of the company against any claim which the debtor might have upon them, and to hold that they were creditors holding security for their debt. I should have been inclined to say that they had a security in fact and in law. But then the Act of 1869 has been altered by the Act of 1883, and some effect must be given to the alteration. The alteration is in the definition of a "secured creditor" contained in the Act. Sect. 168 defines a "secured creditor" as meaning "a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." The words "from the debtor"

have been added to the definition contained in s. 16 of the Bankruptcy Act, 1869. We must give effect to those words. The question here is not whether this lien is a security to the company as against Dickey, but whether it is a security for a debt due to the company from the debtor. I think it cannot in fairness be said to be a lien in respect of a debt due to the company from the debtor, and, therefore, although in one sense it is a security in their hands, it is not such a security as makes them "secured creditors" of the debtor within the meaning of the Act. This new definition shuts that lien out. Therefore, although I agree with the registrar that the company had a lien, I cannot agree that that lien, which was a lien against Dickey, was such a lien as made them "secured creditors" of the debtor, for the lien as against Dickey was not a security for a debt due to them from the debtor.

I think, therefore, that we ought to disagree with the registrar's decision, and to hold that a receiving order must be made.

FRY, L.J. I am of the same opinion.

The debtor owed the company 129*l.* upon a judgment. Dickey was a shareholder in the company, and he had been declared by a competent Court to be a trustee of some of those shares for the debtor. It is said that under these circumstances the company have a lien on the shares for the 129*l.* which is due to them from the debtor. Reliance is placed upon the 20th clause of the company's articles of association, which provides that "the company shall have a first and paramount lien on all shares, and on the dividends thereon, for all moneys due to, and liabilities subsisting with, the company from or on the part of the registered holder or holders thereof, or other the person for the time being entitled thereto as against the company." It must be, and indeed is, conceded that the debtor is not the registered holder of these shares.

The only question, therefore, is, was he "a person for the time being entitled thereto as against the company"? In my opinion, he was not. The policy of the Companies Acts, as has been already pointed out by the Lord Chief Justice, is to free companies from any obligation to take notice of trusts. As against

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Dickey, no doubt the debtor was the person entitled to the shares; but, as against the company, Dickey, and not the debtor, was the person entitled, because they knew nothing of the litigation between him and Dickey; and the Court is not bound to know anything of that litigation, which has been determined as between him and Dickey.

It may be said that some meaning must be given to the words, "other the person for the time being entitled thereto as against the company." In my opinion, those words can be satisfied in other ways. One obvious meaning of the words would include the executors or administrators of a deceased shareholder, or the trustee in bankruptcy of a bankrupt shareholder, or any person who might have obtained a judgment from a Court of competent jurisdiction against the company, whether in an action or in a proceeding under s. 35 of the Companies Act, 1862, that he was entitled as against the company to be registered as the holder of shares. All those persons would come within the meaning of clause 20. In my judgment, the words do not include cestuis que trust of shares, however clear the trust may be, however certain the right of the cestui que trust, because the company are not bound to take notice of trusts.

The present case illustrates, as it seems to me, the expediency of that rule. The position of the debtor as against Dickey is not free from complications. He has obtained a judgment that Dickey is his trustee of certain shares; but the company claim to have a lien on the shares for a very large sum of money as against Dickey. Whether that claim is well or ill founded I know not. The company have the absolute right, under clause 16 of the articles of association, to refuse to register any transfer of the shares, so long as any money is due to them from Dickey, without giving any reason for their refusal. Other persons have lodged transfers of the shares with the company, and insist that those transfers have priority. All these questions have been raised and discussed.

It appears to me, therefore, that the particular circumstances of this case strongly illustrate the expediency of adhering to the general rule which the Lord Chief Justice has stated. But I base my decision on the broad general ground, that the debtor is

not "a person entitled as against the company" to these shares, and not upon the particular circumstances of the case, although I have used them by way of illustration. I think, therefore, that a receiving order should be made.

Appeal allowed.

Solicitors: *Francis & Johnson; E. Kimber.*

W. L. C.

TOWNEND *v.* SHERIFF OF YORKSHIRE.

1890
Feb. 24.

*Sheriff—Withdrawal of Execution—Liability of Execution Creditor—Fees—Taxation of Amount—Appeal—*50 & 51 *Vict. c.* 55, *s.* 20—*The Sheriffs Act,* 1887—*Order of August* 31, 1888, *as to Fees.*

By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 20, a sheriff may demand such fees and poundage as may from time to time be fixed by the Lord Chancellor, with the consent of the judges, and the concurrence of the Treasury.

By Order of August 31, 1888, made under the Act, fees were fixed, and "In every case where an execution is withdrawn, satisfied, or stopped, the fees under this order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be; and the amount of any costs and charges payable under this scale shall be taxed by a master of the Supreme Court or district registrar of the High Court (as the case may be), in case the sheriff and the party liable to pay such costs and charges differ as to the amount thereof":—

Held, that there was no appeal from the taxation of the amount of costs and charges payable under this Order to the sheriff.

APPEAL from the refusal of Day, J., at chambers to review the taxation of the costs and charges payable to the sheriff by an execution creditor.

It appeared that the sheriff had executed writs of fi. fa. by seizing goods at different premises, each separately rated, and of which the judgment debtor was occupier. At two of the premises the goods seized were claimed under bills of sale, and the sheriff withdrew. He carried in his bill of charges to the district registrar for taxation. The execution creditor objected to charges for each seizure at the premises from which the sheriff withdrew, alleging as reasons, that the sheriff was not directed by him or by the warrant to seize there, and did not seize any goods of the debtor. The registrar allowed the charges.

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R. V. Austin, for the sheriff, objected that there was no appeal from the taxation by the registrar.

C. A. Russell, for the execution creditor. The taxation was in the Superior Court, and is subject to review like any other taxation: Order LXV., r. 27, sub-r. 41. By 50 & 51 Vict. c. 55, s. 20, sub-s. 2, any sheriff may demand, take, and receive such fees and poundage as may from time to time be fixed by the Lord Chancellor. . . . . By an Order of August 31, 1888, made under the Act, certain fees are fixed, and it is prescribed that "In every case where an execution is withdrawn, satisfied, or stopped, the fees under this order shall be paid by the person issuing the execution . . . . and the amount of any costs and charges payable under this scale shall be taxed by a master of the Supreme Court or district registrar of the High Court (as the case may be), in case the sheriff and the party liable to pay such costs and charges differ as the amount thereof." These charges have been "taxed." The Act is a consolidation Act, and it repeals, amongst others, 7 Wm. 4, and 1 Vict. c. 55, s. 2, which entitled sheriffs to take such fees and no more as should from time to time be allowed by any taxing officer under the sanction of the judges. For that provision s. 20, sub-s. 2, of 50 & 51 Vict. c. 55, is substituted, but it makes no alteration in the position of the sheriff as to obtaining his fees, and only provides for the fixing of the amount. Before this Order there was no personal obligation on the part of the execution creditor to the sheriff, whose remuneration was by poundage, and the Sheriffs Act, 1887, does not create any such obligation, and if it is imposed by the Order it is ultrà vires. The execution creditor denies the right of the sheriff to any fees for the seizure at the places not named on the writ, and it cannot have been intended that there should be no appeal from the registrar in such a case. He has decided the question of principle, viz., whether the sheriff was entitled to be paid under the order, and not merely a question of amount.

R. V. Austin, for the defendant, was not called upon to argue.

LORD COLERIDGE, C.J. I am of opinion that my brother Day was right. This motion is an attempt to review the taxation of

certain fees said to be recoverable by the sheriff against an execution creditor under an Order made in pursuance of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), on August 31, 1888. The second fee in the table of fees, is, "2. For seizure by the sheriff's officer. For each building or place separately rated at which a seizure is made, 1*l.* 1*s.*;" and the rule which incorporates the schedule and is made with respect to it is that the foregoing fees numbered 2, &c., "shall be levied in every case in which an execution is completed by sale, as fees payable to sheriffs were levied before the making of this order. In every case where an execution is withdrawn, satisfied, or stopped, the fees under this order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be; and the amount of any costs and charges payable under this scale shall be taxed by a master of the Supreme Court or District Registrar of the High Court (as the case may be), in case the sheriff and the party liable to pay such costs and charges differ as to the amount thereof."

It has been ingeniously argued that from the word "taxed" being used in the Order the serious consequence follows that on every taxation of a sheriff's bill of costs by a district registrar or master, an appeal lies to a judge in chambers, the Divisional Court, the Court of Appeal, and so on, to the House of Lords. The learned counsel seemed to concede that, if instead of the word "taxed" some such word, as "settled" or "estimated" had been used, he would have had no basis for his argument. But he says that the word "taxed" is known in law and practice, and carries with it certain incidents which are present in this case. Without denying that as a general proposition of law, we must construe this Order with reference to its subject-matter, and, if it is fairly plain that a word is used which need not mean more than "settled" or "ascertained" by taxation, we ought not to extend the Order by an interpretation which those who framed it never contemplated. The words of the Order, by which alone we must be guided to its meaning, clearly do not mean anything of the kind. They are obviously satisfied by our holding that the taxing master has only to decide between the parties before him if the amount of the items claimed by the sheriff is disputed by the parties under

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the Order liable to pay. It was argued that the matter before the registrar was not a question of amount, and that the amount was not disputed by the execution creditor, but only the right of the sheriff to any fee in respect of the two seizures, and that this was a dispute on something precedent to amount, and was a matter which the taxing officer must consider. I think not. He can no more do so than he could, on an ordinary taxation of a solicitor's bill, entertain the question of retainer or negligence. The retainer is assumed to be in proper form, and the work of the solicitor to have been properly done; the taxing master has only to determine whether the amount of pounds, shillings, and pence in the bill is the proper amount. So here, the taxing officer cannot inquire whether the seizures by the sheriff ought or ought not to have been made. In fact, they were made. If there has been a seizure in fact, the law seems to attach to that seizure the effect that the sheriff is entitled to fees in respect of it. The matter in dispute before the registrar was amount. It is true that in almost every question of amount the right to charge anything at all might be involved. But where a person has a jurisdiction limited to the determination of amount it is reasonable to conclude that it was intended to limit the words used in the Order to a matter within his jurisdiction. The execution creditor is not without remedy, for the parties cannot give the registrar jurisdiction, and if he has allowed, not a wrong amount, but an amount which he had no right to allow, viz., for seizures which were not seizures, that can be questioned in an action with all its ordinary consequences of appeal, costs, &c. No provision for review is made by the Order, and therefore the appeal must be dismissed. If this Order has been made without authority it can be questioned in other ways than this. At present, having regard to several sections of the Act which have not been referred to in argument, it appears to me that the Order is not ultrà vires; but my mind is quite open to argument on the subject, and I do not now decide it.

A. L. SMITH, J. The real and whole question for us is, whether, by the table of fees, the district registrar, or master of the Superior Court, as the case may be, is made sole judge or

not. By the Sheriffs Act, 1887, a consolidating statute, the statutes then in force were wholly repealed. By the Order made under the Act a scale of fees is prescribed, and "the amount of any costs and charges payable under this scale shall be taxed by a master of the Supreme Court or district registrar of the High Court (as the case may be), in case the sheriff and the party liable to pay such costs and charges differ as to the amount thereof." That is, that the amount of costs and charges is to be settled between the party liable and the sheriff by a master or district registrar. In many cases a matter of pure figures and calculation is to be gone into. I ask myself whether it was intended that by the mere use of the word "taxed" the ordinary matters relating to taxation should be appealable on the merits between the parties. I think not. The Order imposes on the master or district registrar the duty of fixing the amount due from one person to the other. The calculation of amount creates no liability per se, it is no order to pay, and the person against whom the assessment is made may resist payment and contest his liability. The question raised—whether it be one of fact or law—that the sheriff did not do his duty by seizing in two places, may be open to argument, but not in these proceedings.

Judgment for the defendant.

Solicitors for the sheriff: *Bell, Brodrick, & Gray.*
Solicitor for execution creditor: *Arthur Harris.*

J. K.

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May 1.

[IN THE COURT OF APPEAL.]

WIEDEMAN *v.* WALPOLE.

Practice—Inspection—Affidavit of Documents—Documents not Disclosed—Jurisdiction to order Inspection—Order XXXI., *rr.* 17, 18.

APPEAL from a decision of the Queen's Bench Division. (1)

When the appeal first came on for hearing it was adjourned to enable the plaintiff to file a further affidavit, and she had since done so. From this affidavit it appeared that the plaintiff had not got in her possession or control or in that of any person on her behalf any such document as that referred to in the order for inspection.

Israel Davis, for the plaintiff.

W. Graham, for the defendant.

THE COURT (Lord Esher, M.R., and Lopes, L.J.) gave no opinion on the point of law dealt with in the judgments in the Divisional Court, but decided that on the facts as disclosed by the affidavit the order could not stand. The appeal was allowed with costs.

Appeal allowed.

Solicitors for plaintiff: *Atkinson & Dresser.*

Solicitors for defendant: *Wakeford May & Woulfe.*

A. M.

(1) Ante, p. 537.

MOXON *v.* SHEPPARD. 1890

April 25.

Practice—Solicitor and Client—Solicitors' Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—"*Property Recovered or Preserved*"—*Money paid into Court under Order* XIV.—*Charging Order.*

The plaintiff's solicitors obtained an order under Order XIV. that the defendant should, as a condition of leave to defend, pay the amount claimed into Court. Subsequently the plaintiff, without the knowledge of his solicitors and without making any provision for their costs, compromised the action, and discharged them from their employment. The defendant then applied for an order for the payment out to him of the money in Court, and produced the plaintiff's consent to such order being made; but the master being of opinion that the compromise was collusive refused to make the order. The solicitors then applied under s. 28 of the Solicitors' Act, 1860, for a charging order upon the money in Court:—

Held, that the money in Court was under the circumstances "property preserved" within the meaning of the section, and that there was jurisdiction to make a charging order.

APPLICATION by solicitors for a charging order under 23 & 24 Vict. c. 127, s. 28.

The plaintiff instructed the applicants, Messrs. Todd, Dennes & Lamb, as his solicitors, to commence an action against the defendant to recover a sum of 96*l.* 11*s.* 3*d.*, due under a covenant of indemnity contained in a deed of assignment of a lease. The applicants accordingly commenced such action on the plaintiff's behalf on September 18, 1889, and on October 11 they applied for summary judgment under Order XIV. The master gave the defendant leave to defend upon the terms of his paying the amount claimed into Court to abide the event. The defendant paid the money into Court and the action proceeded. The applicants continued to act as the plaintiff's solicitors in the action down to February 25, 1890, when they received a letter from the plaintiff informing them that he had compromised the action, and discharging them from continuing to act as his solicitors. Such compromise was effected without the knowledge of the applicants, and without any provision being made for the payment of their costs. On March 19 the defendant applied to the master at chambers for an order that the action should be dismissed and that the money in Court should be paid out to the defendant, and

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at the hearing of such application he produced a consent signed by the plaintiff consenting to such order being made. The master, however, being of opinion that the compromise was collusive and not bonâ fide, refused to make the order, and the money remained in Court. The applicants thereupon applied under s. 28 of the Solicitors' Act, 1860, for a charging order upon the money in Court. The master made the charging order asked for, and on appeal such order was affirmed by Lawrance, J. The defendants appealed to the Divisional Court.

E. T. Holloway, for the defendant. There was no jurisdiction to make this order. The amount paid into Court was not money recovered or preserved within the meaning of s. 28. It was not recovered, for there was no judgment; and it was not preserved, for the preservation spoken of in the section refers to the property of the solicitors' own client: *Berrie* v. *Howitt* (1), whereas here the money in Court belonged not to the applicants' client, but to the defendant. In *Clover* v. *Adams* (2), where money had been paid into Court voluntarily under a plea of payment into Court, it was indeed held that a charging order might be made upon such money in favour of the plaintiff's solicitor; but that case went upon the ground that the plaintiff might have had the money for the asking, whereas here the plaintiff could not take the money out of Court, it having been paid in to abide the event.

Montague Lush, for the applicants. The money paid into Court was property "preserved" through the instrumentality of the plaintiff's solicitors. An order, imposing the payment into Court of the whole amount claimed as a condition of leave to defend, is only made where the master is satisfied that there is no substantial defence to the action. But for the compromise the plaintiff must have recovered the money. Therefore, as soon as the money was paid in, it to all intents and purposes became the plaintiff's money. In *Twynam* v. *Porter* (3) where in a suit by a cestui que trust against a trustee praying for an account and reconveyance, a receiver was ordered to be appointed adversely

(1) Law Rep. 9 Eq. 1. (2) 6 Q. B. D. 622.
(3) Law Rep. 11 Eq. 181.

to the defendant, it was held that such appointment of the receiver was a preservation of the property, and that the plaintiff's solicitor was entitled to a charging order upon it, notwithstanding that since the date of the appointment the parties had without the knowledge of the solicitor compromised the suit. That case is referred to, apparently with approval, by Lord Selborne in *Pinkerton* v. *Easton*. (1) The appointment of a receiver is analogous to the payment of money into Court under Order XIV. [He was stopped by the Court.]

HUDDLESTON, B. This appeal must be dismissed. Through the instrumentality of the plaintiff's solicitors the money was ordered to be paid into Court to abide the event. Then while it was in Court a collusive compromise was effected by the parties without the solicitors' knowledge and in order to deprive them of their costs. It is contended that under the circumstances the money was not recovered. Well, perhaps it was not; but it was in process of recovery, and but for the collusive proceedings would have been recovered. At all events, it was so much preserved out of the defendant's estate.

GRANTHAM, J. I am of the same opinion.

Appeal dismissed.

Solicitor for defendant: *N. Bennett.*

Applicants in person.

(1) Law Rep. 16 Eq. at p. 492.

J. F. C.

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April 2.

WHITNEY and Others *v.* MOIGNARD.

Practice—Pleading — Matter in Aggravation of Damages — Libel—Rules of Supreme Court, 1883, *Order* XIX., *r.* 27.

A paragraph in a statement of claim in an action for a libel published in a newspaper stated that the defendant knew that the words published would be, and the same in fact were, repeated and published in other editions of the same newspaper:—

Held, that evidence of the facts stated in this paragraph would be admissible at the trial, and therefore the paragraph was properly pleaded and ought not to be struck out.

Appeal by the plaintiffs from the order of Lawrance, J., at chambers, striking out the third paragraph of the statement of claim in an action for libel against the printer and publisher of the London edition of the *New York Herald*. The paragraph was as follows:—

"The defendant well knew that the said words as printed and published by him as aforesaid would be, and the same in fact were, repeated and published in editions of the said newspaper published in France and other countries."

Herbert Reed, for the plaintiff. The paragraph was wrongly struck out. The extent of the circulation of the libel is a material fact, which the plaintiff will be entitled to prove at the trial: *Gathercole* v. *Miall.* (1) The defendant's knowledge as to the probable extent of such circulation is also material. Evidence of the facts stated in the paragraph will be admissible at the trial, and it follows that the paragraph is properly pleaded: *Millington* v. *Loring.* (2)

Bankes, for the defendant. The statements contained in this paragraph are statements of evidence, which ought not to be pleaded, and are not relevant either on the question of malice or on the question of the extent of the circulation of the libel: *Lynch* v. *Knight* (3); *Parkins* v. *Scott* (4); *Wood* v. *Lord Durham.* (5)

(1) 15 M. & W. 319.
(2) 6 Q. B. D. 190.
(3) 9 H. L. C. 577.
(4) 1 H. & C. 153; 31 L. J. (Ex.) 331.
(5) 21 Q. B. D. 501.

The paragraph, therefore, was rightly struck out under Order XIX., r. 27.

HUDDLESTON, B. I am of opinion that this appeal ought to be allowed. The third paragraph of the statement of claim alleges that the defendant knew that the words printed and published by him would be, and the same in fact were, repeated and published in editions of the same newspaper published in France and other countries. The question arises whether evidence of that sort would be admissible at the trial of the action; I can entertain no doubt that it would. The law is thus stated, and I think correctly stated, in Odgers on Libel and Slander, 2nd ed., page 168: "Where there is evidence that the defendant, though he spoke only to A., intended and desired that A. should repeat his words, or expressly requested him to do so; here the defendant is liable for all the consequences of A.'s repetition of the slander; for A. thus becomes the agent of the defendant." It seems to me that the proposition cannot be better put than that, and the view there taken is entirely in accordance with the view of the law expressed in the judgments of the Law Lords in *Lynch* v. *Knight* (1), and with the dictum of Littledale, J., in *Rex* v. *Moore* (2), where he said: "If the experience of mankind must lead anyone to expect the result, he" (the defendant) "will be answerable for it." (3) In the ordinary course it can be shewn by evidence that a defendant has published a libel which he knows must necessarily be widely circulated. If the facts stated in this paragraph are admissible in evidence, then the case comes within the decision in *Millington* v. *Loring*. (4) In his judgment in that case Lord Selborne, L.C., said: "Two questions here arise; the first is, whether the matters alleged in paragraph 4 were properly pleaded under Order XIX., rule 4; if they were, then the Court was wrong in striking the paragraph out. The rule provides that, 'Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies.' If those words, 'material facts,' are to be confined to matters which are material to the cause of action, then,

(1) 9 H. L. C. 577.
(2) 3 B. & Ad. 184.
(3) 3 B. & Ad. at p. 188.
(4) 6 Q. B. D. 190.

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no doubt, the words in this paragraph were not properly pleaded. But, in my opinion, those words are not so confined, and must be taken to include any facts which the party pleading is entitled to prove at the trial." (1) That is a clear and distinct authority for allowing a paragraph such as that now before us to be pleaded.

VAUGHAN WILLIAMS, J. I am of the same opinion. I think the plaintiffs can shew by evidence that the diffusion of the libel was likely to be large, and that evidence will be admissible to shew the circumstances under which the defendant must have contemplated that the libel was likely to be widely diffused.

Appeal allowed.

Solicitor for plaintiff: *T. Duerdin Dutton.*
Solicitors for defendant: *Lewis & Lewis.*

P. B. H.

April 28.

MURTAGH *v.* BARRY.

County Court—Practice—New Trial—Power of Judge to grant New Trial—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 93.

The power to grant new trials conferred upon the judges of county courts by s. 93 of the County Courts Act, 1888, is not an absolute power to be exercised upon any grounds which the judge may think fit, but subject to the same limitations as to the grounds on which a new trial may be granted as are imposed upon judges of the Supreme Court.

APPEAL from an order of the judge of the Brompton County Court granting a new trial.

The action was brought to recover damages for an alleged misrepresentation of the value of a medical practice sold by the defendant to the plaintiff. At the trial before the judge and a jury, the jury found a verdict in favour of the defendant, and judgment was entered for him. Upon a subsequent application on behalf of the plaintiff for a new trial upon the ground that the verdict was against the weight of evidence, the judge granted

(1) 6 Q. B. D. at p. 194.

the application, his reason being thus stated upon his notes: "I granted the application on the ground mentioned in the application, and also under the absolute power to grant a new trial given to judges of county courts by s. 93 of the County Courts Act, 1888." (1) The defendant appealed.

J. E. Fox, for the defendant. The power to grant a new trial given to county court judges by s. 93 is not an absolute and uncontrolled power, but is subject to the same limitations as to the grounds for a new trial as are imposed upon the judges of the superior Courts.

A. W. Donald, for the plaintiff. There is nothing in the Act to control the plain meaning of the language of s. 93, the effect of which is to give to county court judges an absolute power to grant a new trial upon any grounds which they may think sufficient.

LORD COLERIDGE, C.J. I think that this appeal should be allowed, and in coming to this conclusion I have no doubt whatever that the learned county court judge honestly took the view which he did take of his duty. It is highly important that this question should finally be set at rest, and that suitors should know that when a county court judge claims not to be bound by rules as to the granting of new trials which are binding upon the High Court, the Court of Appeal and the House of Lords, but claims a right to set aside the verdict of a jury toties quoties upon the simple ground that he does not like the verdict, he is taking up a position which cannot be supported in law. A county court judge is bound by the rules of law which are laid down in and acted upon by this court; the judges of the High Court cannot grant a new trial merely because they are dissatisfied with the verdict; the authorities upon that point are binding upon us and also upon the inferior tribunals subject to our control. The reasons given by the learned judge are insufficient

(1) By 51 & 52 Vict. c. 43 (the County Courts Act, 1888), s. 93, "the judge shall, in every case whatever, have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings."

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in law to authorize him to grant a new trial, and his order must be set aside.

MATHEW, J., concurred.

Appeal allowed.

Solicitor for plaintiff: *S. Hopgood Hart.*
Solicitor for defendant: *T. Blanco White.*

W. J. B.

March 26.

COTTERILL, APPELLANT *v.* LEMPRIERE, RESPONDENT.

Justices—Practice—Information—Conviction—Alternative Statement of Offence—Insufficiency of Statement.

Where a statute or bye-law creates two distinct offences, and provides the same penalty for both, an information and conviction stating the offence in the alternative, as contrary to the statute (or bye-law), are insufficient.

Therefore, where a bye-law provided that "no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public," and the penalty was the same whichever class of persons had ground of complaint, and an information and conviction stated that the defendant permitted smoke to escape contrary to the bye-law, without stating in terms any reasonable ground of complaint to the passengers or the public, or either of them:—

Held, that such statement was insufficient, and the conviction must be quashed.

CASE stated by justices under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33.

The appellant was charged at West Bromwich, in the county of Stafford, upon an information or complaint preferred by the respondent, for that he, the appellant, being the driver of a certain engine attached to a tram-car, the property of the South Staffordshire and Birmingham Districts Steam Tramways Company, Limited, did permit smoke to escape from his engine, contrary to the bye-laws of the Board of Trade, made for the regulation of traffic on the company's lines.

The following facts were proved:—

The appellant was the driver of the engine of the tram-car in question in the Holyhead Road, in the parish of Handsworth, when smoke was emitted from his engine.

The bye-law of the Board of Trade under which the proceedings were taken was as follows: "No smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public." The penalty provided for such offence was one not exceeding 40*s*.

A copy of the bye-laws was thereby directed to be placed in a conspicuous position inside each carriage in use on the tramways.

The information was objected to on behalf of the appellant, on the ground that it did not allege that the smoke was emitted so as to constitute any reasonable ground of complaint to the passengers or the public, or to which of them; but the magistrates overruled the objection.

It was proved to the satisfaction of the magistrates that the emission of the smoke in question was offensive, and they considered that it afforded a reasonable ground of complaint to the public.

On the part of the respondent it was contended that the information and summons were respectively good in point of law, and the offence with which the appellant was charged was completely disclosed and correctly set out, and that the appellant was in no way prejudiced or misled as to the nature of the offence of which he was charged.

The magistrates being of opinion that the appellant was not prejudiced or misled in any way by the information and summons as to the nature of the charge to be preferred against him, and that the same were respectively good in point of law, and that the offence charged against the appellant was completely disclosed, and that he was not in any way misled, and being also of opinion that the appellant was guilty of the offence charged against him, convicted him thereof, and the following was a copy of such conviction, so far as material: "Samuel Cotterill (hereinafter called the defendant) is this day convicted before this court for that he on the 5th day of November, 1889, at the parish of Handsworth, in the said county of Stafford, then being the driver of a certain engine attached to a tram-car, the property of the South Staffordshire and Birmingham Districts Steam Tramways Company, Limited, did then and there permit smoke to escape from his said engine, contrary to the bye-laws of the Board of

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Trade made for the regulation of traffic on the said company's lines there situate, and contrary to the statute in such case made and provided. And it is adjudged that the defendant for his said offence do forfeit and pay the sum of twenty shillings, and fourteen shillings and sixpence costs."

The appellant applied to the magistrates to state a special case, stating that he was desirous of questioning the conviction on the ground that it was not alleged by the information and summons, and did not appear upon the conviction, that the smoke was emitted so as to constitute any reasonable ground of complaint to the passengers or the public, or to which of them.

The question of law upon which the case was stated for the opinion of the Court was whether, as it was not alleged by the information and summons, and did not appear on the conviction, that the smoke was emitted so as to constitute any reasonable ground of complaint to the passengers or to the public, or which of them, the information, summons, and conviction respectively disclosed an offence against the Board of Trade bye-laws, for which the appellant might be so convicted, and were respectively right in point of law, or were erroneous.

A. G. M. M'Intyre, for the appellant. The conviction is bad, in not stating whether what was done constituted any reasonable ground of complaint to the passengers or the public, or which of them. The information and conviction, by stating that the defendant permitted smoke to escape contrary to the bye-laws, state the offence in the alternative, which is clearly insufficient: *Rex* v. *Sadler* (1); *Rex* v. *North* (2); *Rex* v. *Pain*. (3)

[LORD ESHER, M.R., referred to *Colborne* v. *Stockdale* (4); *Ex parte Aldridge* (5); *Rex* v. *Marsh*. (6)]

Johnston Watson, for the respondent. It is unnecessary to state which of the two classes of persons was annoyed, for the bye-law provides the same penalty in both cases.

LORD COLERIDGE, C.J. I yield to this objection with extreme reluctance, because, as Lord Tenterden, C.J., said in *Rex* v.

(1) 2 Chitty, 519.
(2) 6 D. & R. 143.
(3) 7 D. & R. 678.
(4) 1 Strange, 493.
(5) 4 D. & R. 83.
(6) 4 D. & R. 260.

Pain (1), "It is a very nice and subtle objection, and quite beside the merits;" but without overruling several decided cases we cannot refuse to give effect to it. Probably it is true that the principles of construction have been to a certain extent relaxed in formality in modern days; yet at the same time strictness of statement is still valuable, especially in a case where the result may be highly penal. Where the result of a conviction is to inflict a heavy penalty on the person accused, it lies on the prosecution to prove the case strictly. In the present case the bye-law on which the conviction is founded provides that "No smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public." This provides for the case of smoke being emitted so as to cause a nuisance both to the passengers and to the public, or to one only of these two classes of persons, while in either case the penalty provided is the same. It does not follow that the cause of complaint is to the two classes together, for it may be to one and not to the other. It has long since been decided that where a man is convicted on a statute creating an alternative offence, and the same penalty is imposed in either case, the information and conviction must state which offence is intended to be charged. In the present case the information stated simply that the appellant permitted smoke to escape from his engine contrary to the bye-laws of the Board of Trade, and the conviction followed the words of the information. Both the information and the conviction stated a general offence against the bye-laws, whereas the bye-law creates two separate and distinct offences in the alternative. I think that even now, if the point arose for the first time, I should hold that the information and conviction must point out which offence is intended to be charged, but the point is not open, being concluded by authority. There have been three cases, all decided by judges of great authority, in which convictions stated in a manner similar to that in which the conviction in the present case is stated have been held bad. The first of these decisions is *Rex* v. *Sadler* (2), in 1787, where the information charged that the

(1) 7 D. & R. at p. 684.

(2) 2 Chitty, 519.

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defendant "did kill, take, and destroy, or attempt to kill, take, and destroy the fish in a river or stream," and it was adjudged that he was "guilty of the offence aforesaid," and he was convicted "of the premises." There the statute provided the same penalty for either form of offence; but the Court, on the same objection being taken as is now taken before us, namely, that the offence was stated in the alternative, admitted the validity of the objection, and quashed the conviction. The next case is *Rex* v. *North* (1), in 1825, where the defendant was charged with selling "beer or ale" without an excise licence, and, on the same objection being taken, Bayley, Holroyd, and Littledale, JJ., held that it ought to have been stated which of the two alternative offences was intended to be charged, and the conviction was therefore bad. The third case is *Rex* v. *Pain* (2), decided in 1826, where, on the same objection being taken, that the statement was in the alternative, after hearing a long argument by the Attorney-General (Sir John Copley) in support of the conviction, Lord Tenderden said: "I know of no authority which says that a conviction must not have as much certainty as an indictment. Now this Act of Parliament mentions three sorts or descriptions of casks, which if found on board, or attached to a vessel, will render it liable to forfeiture. One is a sort which is used; the second is that intended to be used; and the third that which is fit or adapted for the purpose. Having mentioned these three as distinct descriptions of casks, I think the conviction should have set forth under which of the three the casks in question fell. It is a very nice and subtle objection, and quite beside the merits; nevertheless, the party is entitled to the benefit of it as a defect of form." (3) In that case also the Court unanimously quashed the conviction. It would be presumptuous to undertake to overrule these cases, and we are not entitled to do so. Here we find the same form of words used, and we are bound to adopt the same construction. On the authority, therefore, of the decisions to which I have referred, and which I do not in any way question, I am of opinion that we ought to quash this conviction.

(1) 6 D. & R. 143. (2) 7 D. & R. 678.
(3) 7 D. & R. at pp. 683, 684.

LORD ESHER, M.R. (1) This case, like the old cases which have been referred to, is to be decided on the governing rule and principle of English criminal law, which is, that the question in this country is not, as it is in many countries abroad, simply whether the person charged is guilty or not guilty, but whether the prosecution proves the case strictly and in form. If the cases which have been referred to did not exist, I should still be of opinion that the offence in the present case was not distinctly and properly charged. Take the information. It may be that the smoke annoyed the passengers; whether it did or not is a question of evidence; or, on the other hand, it may be that it annoyed the public. It is important that the defendant should know which of these two offences is intended to be proved against him. Something is wanting, the want of which might cause injustice. But if we look at the cases we find that they are distinct authorities for the contention that this conviction cannot be supported. I dare not say that all these decisions are wrong. On the contrary, I do not think they are wrong, and I should have come to the same conclusion if the point had arisen now for the first time.

Conviction quashed.

Solicitors for appellant: *Smiles, Binyon, & Ollard, for Duignan & Elliot, Walsall.*

Solicitors for respondent: *Charles Robinson & Co., for Clark, West Bromwich.*

P. B. H.

(1) The Lord Chief Justice and the Master of the Rolls were sitting as a Divisional Court of the High Court of Justice.

1890,
April 1.

[IN THE COURT OF APPEAL.]

IN RE ARTOLA HERMANOS. EX PARTE ANDRÉ CHÂLE.

Bankruptcy—Receiving Order—Jurisdiction—Prior Foreign Bankruptcy—Forum of Domicil—Forum Concursus—Locus standi of Syndic under French Bankruptcy.

A firm, having its head offices in Paris, had a branch establishment in England. The firm was declared bankrupt in Paris under the law of France, and a syndic was appointed to administer the estate. Subsequently a bankruptcy petition was presented against them in England, and an order was made appointing an interim receiver. The syndic applied to the Court to discharge this order and to stay all further proceedings under the petition. There was no evidence as to the domicil of the members of the firm, but two of them resided in England, where the firm had large assets. The registrar refused the application. On appeal:—

Held, that the jurisdiction of the Court being undoubted, and there being assets within the jurisdiction, the receiving order was rightly made.

Held, further, that the fact that a prior bankruptcy had been commenced in a foreign country, not shewn to be the country of domicil of the debtors, was no ground for staying the proceedings in this country.

Quære, whether the syndic had any locus standi to make the application.

APPEAL from an order of the registrar, dismissing an application made by the appellant, André Châle, to discharge an order appointing the official receiver interim receiver, and refusing to stay proceedings or dismiss the bankruptcy petition herein.

The facts as stated in the affidavits filed and by counsel were as follows:—The house of Artola Hermanos was founded in Paris, there being five partners, brothers of the name of Artola. The objects of the partnership were banking, discount, and exchange operations, and general commercial operations in France or abroad. The head office was fixed at Paris, and branch agencies or counting-houses might be established wherever the partners should deem it expedient. It was provided further by the deed of partnership, that the operations of the firm should be established by means of regular entries in books kept at the head office, and the parties elected exclusive jurisdiction to the Tribunal of Commerce of the Seine.

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A branch agency of the firm was established in London, and in December, 1889, two of the brothers were residing in England, two in Paris, and one in Spain.

On December 11, 1889, the firm was declared bankrupt in Paris, by the Tribunal of Commerce of the department of the Seine, and the appellant was appointed syndic under the provisions of the Code de Commerce.

On January 2, 1890, a petition in bankruptcy was filed against the debtors in this country by the London and Brazilian Bank, Limited, and on the 3rd of the same month the official receiver was appointed interim receiver of the estate of the debtors. On January 14, a motion was made before the registrar, on behalf of the appellant, that the order appointing the interim receiver should be discharged and that he should be ordered to deliver up to the appellant as syndic all the estate and effects of the debtors which had come into his hands or under his control, and that all further proceedings under the petition should be stayed, or the petition dismissed. This motion was dismissed, and an order was made appointing the official receiver receiver of the estate of the debtors.

The debts and the assets of the debtors in England were both considerable.

André Châle appealed.

1890. March 25. *Finlay, Q.C.*, and *Sidney Woolf, Q.C.*, for the appellant. The previous commencement of bankruptcy proceedings in France should prevent the making of a receiving order in England. The evidence given as to the French law is that it vests the whole administration of the bankrupt's property in the syndic. The general rule is that, where a bankruptcy has been commenced in another country, and by the law of that country all the property of the bankrupt, wherever situated, is subject to be administered in that bankruptcy, then according to the principles of international law, if there are assets in England, the English Court will decline to exercise jurisdiction over them: Story on Conflict of Laws, ss. 403–409; *Royal Bank of Scotland* v. *Cuthbert* (1), approved in the House of Lords in

(1) *Stein's Case*, 1 Rose, 462.

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Geddes v. *Mowat* (1); *Sill* v. *Worswick* (2); *Selkrig* v. *Davies* (3); *Ex parte Cridland* (4); *Ex parte McCulloch* (5); *Ex parte Robinson* (6). This principle is not confined to cases where the bankrupt is domiciled in the foreign country where the bankruptcy proceedings are first commenced. It is sufficient for its application that the Court there has jurisdiction to entertain such proceedings. The object of the rule is to prevent the confusion and conflict that would arise from several bankruptcies proceeding simultaneously in different countries, and the jurisdiction is independent of the question of domicil. Carrying on business in this country gives the Bankruptcy Court jurisdiction, and if the facts of this case were reversed the Court, on the principle mobilia sequuntur personam, would claim jurisdiction over the personal property of the bankrupt in France, and therefore the present claim of the French syndic to control of the property in England should be admitted.

They also cited *Goetze* v. *Aders* (7).

Sir R. E. Webster, *A.G.*, and *Muir Mackenzie*, (*Sir E. Clarke*, *S.G.*, with them), for the official receiver. A prior foreign bankruptcy is not a bar to a bankruptcy elsewhere, unless the foreign bankruptcy takes place in the country of domicil of the bankrupt, and acts as an assignment of all his property. *Geddes* v. *Mowat* (8), and other cases where the apparent conflict of jurisdiction lay between England and Scotland, may have been decided on the ground of the imperial character of the interests involved. In *Smith* v. *Buchanan* (9) the effect given to the title of assignees under foreign bankruptcies is ascribed to the fact that the right to personal property must be governed by the laws of the country where the owner is domiciled: see also *Holmes* v. *Remsen* (10); *Bartley* v. *Hodges* (11); *In re Blithman.* (12) The last-mentioned case is discussed in *In re Davidson's Settlement Trusts.* (13) The latter case, however, is distinguishable, because

(1) 1 Glyn & J. 414.
(2) 1 Hy. Bl. 665.
(3) 2 Rose, 97, 291.
(4) 3 Ves. & B. 94.
(5) 14 Ch. D. 716.
(6) 22 Ch. D. 816.
(7) Court Sess. Cas. 4th series, vol. ii. 150.
(8) 1 Glyn & J., 414.
(9) 1 East, 6.
(10) 4 Johns. Ch. (N.Y.) 460, at p. 469.
(11) 1 B. & S. 375.
(12) Law Rep. 2 Eq. 23.
(13) Law Rep. 15 Eq. 383.

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the insolvent, by being himself petitioner, submitted to the law of the place where he was adjudicated insolvent, without regard to whether he was domiciled there. There is no evidence that the bankrupts had a French domicil. Then, further, it must be shewn that the foreign bankruptcy acts as an assignment of all the bankrupt's property: *Solomons* v. *Ross* (1), in a note to *Folliott* v. *Ogden* (2), where the reason given why the bankruptcy law of Holland was allowed to take effect here is—that it divests all property out of the bankrupt, and vests it in the curators or assignees. That is not the effect of such an order as the one made in this case by the French Court. If the jurisdiction of the Court to appoint a receiver is established, the application to stay the proceedings should not be entertained. Each Court can work out the bankruptcy proceedings in respect of the assets in its own country, and cases of such concurrent proceedings are not uncommon: *Banco de Portugal* v. *Waddell* (3); *Ex parte Wilson, In re Douglas* (4); *Ex parte McCulloch* (5); *Ex parte Cridland* (6); *In re O'Reardon.* (7)

[They referred also to Dicey's Law of Domicil, Rule 63; Kent's Commentaries, vol. ii. p. 406; Bell's Commentaries, 7th ed. vol. ii. p. 376; Westlake on Private International Law, p. 142.]

Everitt, Q.C. (*F. Cooper-Willis,* with him), was heard for the petitioning creditor. [He cited *Ewing* v. *Orr-Ewing.* (8)]

Finlay, Q.C., in reply.

1890. April 1. LORD COLERIDGE, C.J. In this case there were two applications; one was to discharge a receiving order which had been made in the bankruptcy, and the other was to stay all proceedings under the bankruptcy, and the ground of both those applications was the same, namely, that there is a French bankruptcy and a French representative, called a syndic, and it is by him that these applications are made. Now, with regard to the discharge of the receiving order, it appeared to me from the very beginning that as far as that part

(1) 1 Hy. Bl. 131, n.
(2) 1 Hy. Bl. 124.
(3) 5 App. Cas. 161.
(4) Law Rep. 7 Ch. 490.
(5) 14 Ch. D. 716.
(6) 3 Ves. & B. 94.
(7) Law Rep. 9 Ch. 74.
(8) 9 App. Cas. 34.

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of the application is concerned it must necessarily fail. There being unquestionably no doubt as to the jurisdiction on the part of the Court in this country to make a receiving order, it seems to me that the syndic, who, I dare say, is clothed with powers for the administration of the property in France, has no ground whatever for interfering here with the operation of an English Court, having undoubted jurisdiction in the premises, and having done no more than issue a receiving order to make the assets of the bankruptcy come into the proper hands. Therefore I should have no doubt, on the ground of total absence of any locus standi on the part of the foreign syndic, that that part of the application, at all events, must be refused.

Then comes the question—which was very much more elaborately argued, and about which there is unquestionably a great deal more to be said—whether we should stay proceedings in this country, assuming that the proceedings here have been begun with jurisdiction, and that there is jurisdiction to continue them. This is an application, therefore, not to the jurisdiction of the Court, but to the discretion of the Court in the exercise of that jurisdiction, which it is admitted the Court for the purpose of this argument has.

The ground of the application in this case to the discretion of the Court is the fact that there are two bankruptcies going on contemporaneously. Artola Hermanos are merchants in a very large way of business, with large assets, as we understand, certainly in France and in England, possibly in other European countries, but it is sufficient to say certainly in France and England, and in France and England alike (the French proceedings having rather, as I understand, priority) bankruptcy proceedings against these gentlemen are in course of procedure. No doubt, that is not a thing to be encouraged. There is no doubt that the double bankruptcy occasions double costs, and brings with it many inconveniences which were pressed upon us in the arguments, and the force of which I am very far indeed from denying; but I can find no substantial ground—no legal ground—for interfering in a way which, as far as all the cases which have been brought before us are concerned, has never been done in this country. The only cases in which the Courts intimate that

they would do this, if necessary, or rather intimate the ground upon which it would be legal to found such an application, and to continue it to a successful issue in these Courts, are where there were two bankruptcies going on, and one of them was going on in the country of the domicil of the bankrupt. The Scotch case, *Stein's Case* (1), to which we were so fully referred, was a case recognised distinctly afterwards in the House of Lords, and therefore the principles of it are principles upon which we are justified in acting. It is a case to be found in the appendix to the first volume of Rose's Reports, and is set out at full length. The whole matter is put upon the question of domicil, and it is said that, upon the well-known and established ground that by fiction of law personal property has no locality, but follows the locality of the person to whom it belongs, where there is personal property in two countries, and where therefore it becomes a question of conflict to which of the localities, either of which might be ascertained as the place where the owner of the property is located (I use that word purposely), these proceedings should pertain, and if it is necessary that there should be but one proceeding in bankruptcy, that proceeding should be in the country of the domicil. Now that is a convenient rule—a rule expanded beyond perhaps what was necessary in the judgment of Lord Westbury in *Enohin* v. *Wylie*. (2) Whether Lord Westbury went too far in the generality of his dicta, and whether the other noble and learned lords, who appear to have, at all events, qualified what he said and perhaps differed from him, were right or he was right, it is not necessary for me, and I certainly will not undertake, to say or even suggest. This only I will say, that if Lord Westbury's doctrine is right it is a very convenient doctrine; but whether it would stand the test of further investigation, and be recognised in the highest Court of Appeal in this country, may be, after the judgments of Lord Selborne and others in *Ewing* v. *Orr-Ewing* (3), a very great question. But it is not necessary to decide that matter now, because in this case, when it was put to Mr. Finlay whether he would like to take time to supply us with evidence of the domicil of these gentlemen, he,

(1) 1 Rose, 462.

(2) 10 H. L. C. 1.

(3) 9 App. Cas. 34.

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after a little consideration, distinctly declined to do so, or to supplement his argument by any fresh facts or any fresh evidence.

There is then no evidence before us as to the domicil of the Messrs. Artola. They certainly have no domicil as far as appears in England, equally certainly as it seems to me they have no domicil upon any evidence which has been brought before us, in France. They probably from their name and from other things that have been stated in the course of the argument have their domicil of origin in Spain. But whether we are right or no in that particular is immaterial, because it is enough for us to say that, between the two conflicting countries, France and England, there is no evidence to shew that as regards either of them there exists that fact of domicil which, though this has not been positively decided, there is authority for saying might be a governing fact. The question comes back, therefore, to one of discretion and convenience, and I wish to observe that we are not deciding what is to be done with the English assets when they are collected, nor according to what law, the law of France or of England, they are to be administered amongst the creditors. Without, therefore, determining, or even suggesting what may be the governing law of the distribution of these assets, it is enough to say that, on the present application, which is to stay proceedings and prevent the assets from being collected, there is no ground brought forward to enable me to say that the English proceedings ought, at all events at this stage, to be in any manner interfered with.

I am therefore of opinion, and we have the authority of the Master of the Rolls for saying that he agrees in this conclusion, that this application, as well as the other, must be refused.

FRY, L.J. The short facts of this case, as they appear to me to result from the statement of the learned counsel and the evidence before us, especially the statement of affairs which has been put in evidence, are these. There were five brothers, Spaniards by birth, therefore presumably of Spanish domicil of origin. Two of those brothers are residing in Paris, one of them in Spain, and two in England, the five brothers carrying on an extensive business as merchants and bankers in Spain, France,

and in England, and they have in Spain large immoveable assets. The conclusion from these facts would naturally be that all the five brothers have a Spanish domicil. Nothing has appeared to the contrary of that conclusion, and, as the Lord Chief Justice has already observed, Mr. Finlay, who appeared for the applicant, did not desire time to produce evidence to countervail that conclusion.

The application made by the French syndic is of a double character. In the first place, he applies for the rescission of a receiving order. In the next place he asks for a stay of all further proceedings, and that the assets in the English bankruptcy may be handed over to the French syndic. Now, with regard to the receiving order, it appears to me plain that this Court had jurisdiction, because the 6th section of the Bankruptcy Act, 1883, refers to the domicil of the debtor or his ordinary residence or permanent place of business for a year before the date of the presentation of the petition. It is not denied that the circumstance of residence in England is present in the case of two of the brothers. Is there then any ground on which it would be improper to exercise the jurisdiction of the Court in pronouncing a receiving order? I will not say that a receiving order would be ex debito justitiæ; but I think a receiving order ought to be pronounced where the conditions of the Act have been satisfied, unless there be some valid reason to the contrary.

Now in the present case no such reason has been made out. On the contrary, the presence of assets of the firm to a large extent in this country seems to me, as it seemed to Baggallay, L.J., in *Ex parte Robinson* (1), to be a strong circumstance in favour of the making of a receiving order. I think, therefore, that, on the merits, the receiving order ought not to be rescinded; but I further express at least my doubt whether the French syndic has any locus standi whatever, either to oppose the pronouncing of a receiving order in this country, or to apply for its rescission after it has been pronounced.

Turning to the second portion of the application, namely, that all proceedings in the English bankruptcy may be stayed, I will

(1) 22 Ch. D. 816.

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confess the difficulty which this class of case appears to me to create. Lord Eldon, I think, on more than one occasion described these cases as being very distressing cases, and something of the distress which he felt has, I think, remained to successive judges who have had to deal with these concurrent bankruptcies.

Three views with regard to what was the proper procedure of the Court seem to me to have come out during the course of the discussion of the cases. One of those views is this, that where there are concurrent bankruptcies each forum is to administer the assets locally situated within its jurisdiction, each forum of course allowing all the creditors, wherever resident, to prove, but applying the doctrine of hotchpot so as to produce, so far as may be, equality between the proofs of the various creditors. Now no doubt in that mode of procedure there are several inconveniences, especially the possibility of double or triple proofs, but it may be that those inconveniences are less than the inconveniences of any other course. It certainly seems to me that the decision of the House of Lords in the case of *Ewing* v. *Orr-Ewing* (1) tends to establish a similar principle with regard to the assets to be administered in administration actions, because in that case they asserted, if I understand the decision rightly the jurisdiction of the forum in which the assets might be locally situate to administer those assets, although it may be that the law of the domicil may govern the mode of distribution. Now if that rule be applied, it is obvious the application to stay the proceedings must fail.

Another rule which has been suggested is this, that every other forum shall yield to the forum of the domicil, that the forum of every foreign country, every country not of the domicil, shall act only as accessory and in aid of the forum of the domicil. That, it is said, is the forum concursus, to which all persons who are interested in the administration of the estate are bound to have recourse. No doubt there is a great deal in point of law and principle to be said in favour of that view, and there are certainly some conveniences in it. If that view were to prevail then this present application fails.

Then there is a third view, which is the only one in which the

(1) 9 App. Cas. 34.

application could be successful, and it is this, that the forum of the country in which the debtor has assets and which first adjudicates him bankrupt, although it be not the forum of the domicil, is entitled to claim the assets from the tribunals of other countries in which he has assets. That doctrine appears to me to be an entirely unreasonable one. There is this broad difference between yielding to the forum of the domicil and yielding to the forum of the first country which happens to pronounce a man bankrupt:—personal property is said to follow the person, and from that it follows that the forum of domicil has, by what has been sometimes called a fiction of law, a right by judgment against a bankrupt to divest him of all personal property and vest it in his assignees, and by the fiction to which I have referred that judgment, pronounced by the forum of the domicil, is said to have universal validity, and to be capable of transferring personal property locally situate beyond the jurisdiction of that forum. The forum, not of the domicil but of the country in which the debtor may have assets, has no such right to claim universal obedience to its judgment; it has no right to pronounce a judgment which will extend beyond the personal assets locally situate within its jurisdiction.

It seems to me, therefore, that the contention which, as I have already said, is the only one on which the application can succeed —that every other forum must yield to the forum of a country, in which there are assets, which first pronounces the bankruptcy —is one inconsistent with well-known principles of law. But then it is said that *Stein's Case* (1) proceeds on that principle, and it was elaborately and ably urged upon us that that was the true view of that case. I do not conceal from myself that there are difficulties in that case. It is not easy to see what were the facts on which the Court arrived at the conclusion with regard to the domicil at which they did arrive. Further, it would appear that the Scotch Court considered, and for aught I know considered rightly according to Scotch law, that a firm of merchants has a domicil as a firm, and they seem further to have considered that a firm is capable of having two domicils, and they chose between the two domicils only by priority of

(1) 1 Rose, 462.

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adjudication. But nevertheless the case proceeds upon this main principle, that the Court of the domicil has the right to pronounce a universally valid judgment with regard to the personal property of the bankrupt. That proposition underlies the decision, and whatever difficulties there may be in the application of it do not detract from it. That general principle is fatal to the present application.

Therefore I entirely agree with the Lord Chief Justice in the judgment which he has given, and I think this application must fail.

Appeal dismissed.

Solicitors for applicant: *Michael Abrahams, Son & Co.*
Solicitors for petitioning creditor: *Birchams & Co.*
Solicitor for registrar: *Solicitor to the Board of Trade.*

A. M.

March 27.

JONES *v.* PADGETT.

Sale of Goods—Contract to Manufacture equal to Sample—Latent Defect in Sample—Implied Warranty of Merchantableness—Limits of.

The plaintiff carried on two businesses, that of a woollen merchant and that of a tailor. The defendants, woollen manufacturers, contracted with the plaintiff as a woollen merchant to manufacture and supply to him indigo blue cloth according to sample. The plaintiff intended to use the cloth in his tailor's business for the purpose of making it into servants' liveries; but neither the fact that the plaintiff was a tailor nor that he intended to use the cloth for liveries was known to the defendants. There was evidence that one of the ordinary uses to which that particular kind of cloth was applied was the making of liveries. The defendants supplied to the plaintiff cloth which corresponded with the sample; but the sample, owing to a latent defect, was unsuited for the purpose of being made into liveries, though there was no evidence that it was unsuitable for other purposes for which cloth of that description was frequently used. The plaintiff having brought an action against the defendants for breach of an implied warranty of merchantableness, the judge left to the jury the question whether the cloth was merchantable as supplied to woollen merchants, and refused to leave to them the question whether an ordinary and usual use of cloth of that description was the making of it into liveries:—

Held, that the judge was right in refusing to leave the latter question to the jury, and that there was no misdirection.

APPEAL from the Westminster County Court.

The plaintiff carried on the business of a woollen merchant at one address, and of a tailor at another. As a woollen merchant,

he ordered of the defendants, who were woollen manufacturers, a quantity of "indigo blue cloth," to be made according to sample. He intended to use the cloth in his business as a tailor for the purpose of making it into servants' liveries; but the fact that he was a tailor as well as a woollen merchant was unknown to the defendants, and he did not communicate to them the particular purpose for which he wanted the cloth. The defendants made and supplied to the plaintiff cloth which was of the description ordered, and which corresponded with the sample. The plaintiff made the cloth into liveries which he supplied to a London club for the use of its servants. After the liveries had been in use for a few weeks, they shewed signs of wear, the surface of the cloth came off, and the dye came out. It was admitted that the cloth was not strong enough in texture for the hard usage to which servants' liveries are subjected, and that it was altogether unsuitable for that purpose. There was evidence that one of the ordinary uses to which indigo blue cloth was applied was the making of servants' liveries, though it was also frequently used for other purposes, such as carriage linings, caps, and boots. There was no evidence that the cloth supplied by the defendants was unsuitable for these latter purposes. Before ordering the cloth the plaintiff subjected the sample to the ordinary tests for the purpose of ascertaining whether it was suitable for liveries, and failed to discover that it was not so. The plaintiff having sued the defendants for breach of an implied warranty that the cloth was merchantable, the judge left to the jury the question whether it was merchantable as supplied to woollen merchants, and refused to leave to them the question whether an ordinary and usual use of cloth of the description ordered was the making of it into liveries. The verdict having passed for the defendants, the plaintiff moved for a new trial on the ground of misdirection.

Danckwerts, for the plaintiff. The judge misdirected the jury in omitting to explain to them what was meant by the term "merchantable." Cloth of a well-known trade description is impliedly warranted to be merchantable for all the purposes to which it is ordinarily applied. The cloth was sold to the plaintiff as a

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woollen merchant. A woollen merchant buys for the purpose of re-selling, and he would re-sell for any one of the purposes for which such cloth is ordinarily used. Cloth is ordinarily used for the purpose of making clothes, and indigo blue cloth for the purpose of making a particular kind of clothes, namely, liveries. The defendants, therefore, ought to have known that this cloth might be used for the particular purpose of making liveries. It was long since established in *Jones* v. *Bright* (1) that a manufacturer impliedly warrants his goods to be fit for the particular purpose to which he in fact knows that they are to be applied, and the case of *Drummond* v. *Van Ingen* (2) carried that doctrine one step farther, and extended the implied warranty to purposes to which the manufacturer ought to know that the goods are likely to be applied. In that case Lord Herschell rested the implication of a warranty on the fact that there was "nothing unreasonable in expecting that the maker of 'coatings' should know that they are to be turned into coats and other garments, and that he should further know what coatings will and what will not be capable of use for this purpose in the ordinary methods"; the making of coats being one of the ordinary uses to which coatings are applied. No doubt he admitted that it would be "too much to impute to the maker of that common article a knowledge of the details of every manufacture into which it may enter in combination with other materials"; but by the terms of that limitation he undoubtedly suggests that the warranty extends to all the ordinary uses for which the goods are customarily used.

Guiry, for the defendants, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that in this case the direction of the county court judge to the jury was right, and that there was not any such non-direction as made his direction amount to a misdirection. There is no doubt that if a manufacturer sells an article which he knows is bought for a particular purpose, he impliedly warrants that it is fit for that particular purpose. That is a principle which was established some sixty years ago in the case of *Jones* v. *Bright* (1), and has been acted

(1) 5 Bing. 533. (2) 12 App. Cas. 284.

upon ever since. But the present case is not within that rule, because nothing was mentioned to the seller as to the particular purpose for which this cloth was bought, and there was nothing to fix him with knowledge of that purpose. Here all that was shewn was that the seller on the one side was a manufacturer, and the buyer on the other side was a woollen merchant. No doubt it was possible that the buyer might sell the goods to some person or other who might use them for a purpose for which they were not fit, and I may assume that the goods here were unfit for the particular purpose to which the plaintiff applied them. But there was nothing, beyond the position of the parties, to shew that the seller knew the specific purpose for which they were bought, and it could not be denied that they might have been used for a variety of other purposes for which they were fitted. The plaintiff might have sold them to be used for purposes for which they were applicable. But then it is said that the case of *Drummond* v. *Van Ingen* (1) in the House of Lords carries the law farther than *Jones* v. *Bright*. (2) In my opinion that is not so. There was no intention on the part of the Lords to extend the old rule. Lord Macnaghten expressly said that he did not go beyond it; so also did Lord Selborne. And Lord Herschell, on whose judgment special reliance has been placed, was particularly careful to explain that he did not intend to carry the doctrine farther. He said: "It was urged for the appellants by the Attorney-General, in his able argument at the bar, that it would be unreasonable to require that a manufacturer should be cognisant of all the purposes to which the article he manufactures might be applied, and that he should be acquainted with all the trades in which it may be used. I agree. Where the article may be used as one of the elements in a variety of other manufactures, I think it may be too much to impute to the maker of this common article a knowledge of the details of every manufacture into which it may enter in combination with other materials." If the plaintiff is to succeed, it must be on the ground of the reasonableness of imputing such knowledge to the manufacturer. I do not see that there was any evidence that the making of liveries was the only purpose, or even the most

(1) 12 App. Cas. 284. (2) 5 Bing. 533.

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usual purpose, for which this particular kind of cloth was ordinarily used, and unless that is so there is nothing to fix the manufacturer with knowledge which would bring the case within the rule.

LORD ESHER, M.R. The question which was left by the judge to the jury, and the sufficiency of which is now complained of, was whether the cloth supplied by the defendants to the plaintiff was merchantable as supplied to woollen merchants. The cloth in question was ordered under a particular name, namely, "indigo blue cloth," by a woollen merchant of a woollen cloth manufacturer, to be made according to sample. It was not denied that the cloth supplied answered the name, nor was it disputed that it agreed with the sample. But it was said that there was a breach of an implied warranty that it should be fit for the particular purpose of being made into liveries. Now the rule with regard to the implied warranty of fitness which arises in the case of a sale of goods is that which is laid down in *Jones* v. *Just* (1) in the fourth of the five classes of cases there enumerated: "Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied." Those are the limits of the warranty. Here the goods were ordered by a woollen merchant. He no doubt happened also to be a tailor; but that fact was unknown to the defendant. The purpose for which a woollen merchant buys cloth is to sell it again to others. There was indeed evidence that such cloth as this, if sold to a tailor, was not fit for one of the purposes to which a tailor might apply it. But there was no evidence that it was not fit for other of the purposes even of a tailor. Moreover, the cloth might have been sold by woollen merchants to fifty other classes of persons besides tailors. There was no evidence that wool manufacturers know that woollen merchants sell to tailors at all. The manufacturer here was not told, either expressly or by implication, that the

(1) Law Rep. 3 Q. B. 197.

goods were ordered that they might be sold to tailors. Then is there any authority which establishes that where goods are ordered by a woollen merchant of a cloth manufacturer the latter must be taken to know that they may be ordered to be sold to tailors? The case referred to in the House of Lords is no authority for such a proposition, for there the goods were ordered under the designation of "coatings," which necessarily imported that they were intended to be made up into coats, and therefore the facts of that case came within the precise terms of the fourth rule in *Jones* v. *Just.* (1) It is suggested that every wool manufacturer is bound to know all the ordinary purposes to which a woollen merchant may put the cloth which he buys—that is to say, he is bound to be acquainted with all the trades to which the woollen merchant may re-sell it; but that is the very proposition which Lord Herschell expressly denies. "It would be unreasonable," he says, "to require that a manufacturer should be cognisant of all the purposes to which the article he manufactures might be applied, and that he should be acquainted with all the trades in which it may be used." Though he adds that "There seems nothing unreasonable in expecting that the maker of 'coatings' should know that they are to be turned into coats." And Lord Selborne says, that although, "if the goods being of a class known and understood, between merchant and manufacturer, as in demand for a particular trade or business, and being ordered with a view to that market, are found to have in them, when supplied, a defect practically new, not disclosed by the samples, but depending on the method of manufacture, which renders them unfit for the market for which they were intended," the doctrine of implied warranty applies; yet that doctrine "ought not to be unreasonably extended, so as to require manufacturers to be conversant with all the specialities of all trades and businesses which they do not carry on, but for the purposes of which goods may be ordered from them." The Lords decided that case on the ground that it came within the fourth proposition in *Jones* v. *Just* (1), which proposition they held to be applicable to a case in which the goods were bought by sample. But here there is no evidence to bring the case within that proposition. The

(1) Law Rep. 3 Q. B. 197.

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direction of the county court judge was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *C. Butcher.*

Solicitors for defendants: *Bell, Brodrick & Gray, for Calvert, Leeds.*

J. F. C.

Applied. SELIGMAN *v.* DOCKER. [1948] 2 All E.R. 887.

Followed. SELIGMAN *v.* DOCKER. [1949] Ch. 53

March 27.

GILES *v.* WALKER.

Nuisance—Thistles—Neglect of Occupier to cut Thistles—Seeds blown on to adjoining Land.

An occupier of land is under no duty towards his neighbour to periodically cut the thistles naturally growing on his land, so as to prevent them from seeding; and if, owing to his neglect to cut them, the seeds are blown on to his neighbour's land and do damage, he is not liable.

APPEAL from the Leicester County Court.

The defendant, a farmer, occupied land which had originally been forest land, but which had some years prior to 1883, when the defendant's occupation of it commenced, been brought into cultivation by the then occupier. The forest land prior to cultivation did not bear thistles; but immediately upon its being cultivated thistles sprang up all over it. The defendant neglected to mow the thistles periodically so as to prevent them from seeding, and in the years 1887 and 1888 there were thousands of thistles on his land in full seed. The consequence was that the thistle seeds were blown by the wind in large quantities on to the adjoining land of the plaintiff, where they took root and did damage. The plaintiff sued the defendant for such damage in the county court. The judge left to the jury the question whether the defendant in not cutting the thistles had been guilty of negligence. The jury found that he was negligent, and judgment was accordingly entered for the plaintiff. The defendant appealed.

Toller, for the defendant. The facts of this case do not establish any cause of action. The judge was wrong in leaving the question of negligence to the jury. Before a person can be

charged with negligence, it must be shewn that there is a duty on him to take care. But here there is no such duty. The defendant did not bring the thistles on to his land; they grew there naturally. [He was stopped by the Court.]

R. Bray, for the plaintiff. If the defendant's predecessor had left the land in its original condition as forest land the thistles would never have grown. By bringing it into cultivation, and so disturbing the natural condition of things, he caused the thistles to grow, thereby creating a nuisance on the land just as much as if he had intentionally grown them. The defendant, by entering into occupation of the land with the nuisance on it, was under a duty to prevent damage from thereby accruing to his neighbour. The case resembles that of *Crowhurst* v. *Amersham Burial Board* (1), where the defendants were held responsible for allowing the branches of their yew trees to grow over their boundary, whereby a horse of the plaintiff, being placed at pasture in the adjoining field, ate some of the yew twigs and died.

LORD COLERIDGE, C.J. I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil. The appeal must be allowed.

LORD ESHER, M.R. I am of the same opinion.

Appeal allowed.

Solicitors for plaintiff: *Field, Roscoe & Co.*

Solicitor for defendant: *H. B. Wade, for Fowler, Warwick, & Neale, Leicester.*

(1) 4 Ex. D. 5.

J. F. C.

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April 15, 16;
May 5.

[IN THE COURT OF APPEAL.]

COOK *v.* WHELLOCK.

Practice—Security for Costs—Action by undischarged Bankrupt—Cause of Action arising after Bankruptcy.

The plaintiff, a bankrupt, whose discharge was suspended until he had paid 5*s.* in the pound, sued the defendant for arrears of rent in respect of premises let by him to the defendant subsequently to his bankruptcy:—

Held (affirming the decision of the Queen's Bench Division) that the plaintiff ought not to be ordered to give security for the costs of the action.

APPEAL from the order of a master, referred to the Court by a judge at chambers.

The action was brought to recover rent due in respect of a warehouse and premises let by the plaintiff to the defendant. It appeared that, at the time when the agreement of tenancy between the plaintiff and defendant was entered into, the plaintiff was an undischarged bankrupt, his discharge in bankruptcy having been suspended until he paid 5*s.* in the pound, which he had not done. Upon an application by the defendant the master had ordered the plaintiff to give security for costs to the amount of 60*l.*, and in the meantime further proceedings to be stayed, unless within seven days the official receiver in bankruptcy were made a plaintiff in the action. The plaintiff appealed.

Stephen Lynch, for the plaintiff. The plaintiff can sue in his own name in respect of a cause of action accruing after his bankruptcy, unless his trustee intervenes, which he has not done; and in the absence of any suggestion that the trustee is the real plaintiff he will not be required to give security for costs: *Buchan* v. *Hill*. (1)

Yelverton, for the defendant.

VAUGHAN WILLIAMS, J. This is an appeal from an order of a master whereby the plaintiff was ordered to give security for costs, and in the meantime the action was ordered to be stayed, unless within seven days the official receiver was made a

(1) W. N. (1888), p. 233.

plaintiff in the action. I am of opinion that that order was wrong and must be reversed.

The question for our determination is whether, where the plaintiff is an undischarged bankrupt suing in respect of a cause of action accruing subsequently to the bankruptcy, he can, simply because he is an undischarged bankrupt, be called upon to give security for costs. I think that he cannot. This is entirely different from the case where an action is brought in respect of a cause of action arising prior to the bankruptcy, for in that case the bankrupt would properly be called a nominal plaintiff; he would have no beneficial interest whatever in the action, and as a consequence of this it was provided by s. 142 of the Common Law Procedure Act, 1852, that, where an action was pending at the time of the bankruptcy, the defendant should not be allowed to plead the bankruptcy (which otherwise would be a complete answer to the action) if the assignees were willing to intervene. But that section only applied to actions pending at the time of the bankruptcy, as appears from *Stanton* v. *Collier*. (1) If no action was pending, but the cause of action existed at the time of the bankruptcy, s. 142 did not apply, and the defendant was in a position to plead the bankruptcy, and so put an end to the action. But a cause of action arising after the bankruptcy stands upon a wholly different footing. It was held in *Herbert* v. *Sayer* (2), that, where the action was brought by an undischarged bankrupt in respect of a cause of action arising after the bankruptcy, a plea of bankruptcy was of itself not a good plea, but that the intervention of the assignees must also be pleaded; in other words, it was decided that, unless and until the assignee intervened, the bankrupt had a good cause of action, and was entitled to sue in his own name. In *Buchan* v. *Hill* (3), North, J., really decided the point which I have just dealt with, and also the point in issue in this case; he held that an undischarged bankrupt could sue without his trustee (following *Herbert* v. *Sayer* (2)), and that, unless there was a suggestion that the action was being really brought on behalf of the trustee by the bankrupt, no order ought to be made for security for costs. That

(1) 23 L. J. (Q.B.) 116. (2) 5 Q. B. 965.
(3) W. N. (1888) p. 233.

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authority, supposing the report to be accurate, I should certainly follow, but even without it I should myself have come to the same conclusion. The judgment of Lindley, L.J., in *Rhodes* v. *Dawson* (1), lays down the plain rule that the order as to security for costs only applies where the plaintiff is merely a nominal plaintiff suing for the benefit of others; but in a case like the present, where the bankrupt has a good cause of action as against all the world, unless his trustee intervenes, he can in no sense be called a nominal plaintiff; he is a real one. He may be likened to an agent suing on a mercantile contract in his own name; his undisclosed principal would have a right to intervene, but until such intervention the agent would be able to sue. For these reasons I think that the order was wrong, and the appeal must be allowed.

LAWRANCE, J. I am entirely of the same opinion.

Appeal allowed.

W. J. B.

Against this decision the defendant appealed.

May 5. *Yelverton*, for the defendant. The plaintiff is an undischarged bankrupt and is a mere nominal plaintiff, the money sued for being really the property of his trustee in bankruptcy. That being so, he ought to be made to give security for costs, unless the trustee in bankruptcy is made a plaintiff in the action. By s. 20 of the Bankruptcy Act, 1883, upon adjudication of bankruptcy, the property of the bankrupt is to become divisible among his creditors and is to be vested in a trustee. Then by s. 44 the property of the bankrupt divisible among his creditors is to comprise all such property as may be acquired by or devolve on the bankrupt before his discharge. Therefore the plaintiff is not in truth the person entitled to recover the rent of these premises which really belongs to his trustee; and, if the plaintiff succeeded in the action, he would hold the money recovered as a trustee for his trustee in bankruptcy, and any benefit that might accrue from the action would pass to his estate.

(1) 16 Q. B. D. 548

Under these circumstances, the case comes within the established principle that, where a plaintiff is a mere nominal plaintiff and is insolvent, he will be ordered to give security for costs. The conclusion to be drawn by implication from the judgment of the Court of Appeal in *Rhodes* v. *Dawson* (1) is that, where a plaintiff has been actually adjudicated bankrupt, he will be ordered to give security for costs. He also cited *Cowell* v. *Taylor*. (2)

Lynch, for the plaintiff, was not called upon.

LORD ESHER, M.R. It appears to me that the judgment of the Court below in this case was quite right in point of law. The plaintiff, being then an undischarged bankrupt, let certain premises to the defendant, and is now suing him for rent of those premises in arrear. It was said in the first place that the plaintiff was a bankrupt when he let the premises, and was still undischarged, and he was therefore not the right plaintiff. That is equivalent to saying that he had no authority to let the premises, and the trustee is really the landlord of them. The answer to any such contention as that is, that the defendant is estopped from making it. Having been let into possession of the premises by the plaintiff, he cannot say that the plaintiff is not his landlord, but the trustee in bankruptcy. I should say that the defendant would not be allowed at the trial to give evidence that the plaintiff was an undischarged bankrupt, and that there was a trustee of his property appointed in the bankruptcy, because such evidence would be immaterial. It is argued that, though this be so, yet in a preliminary proceeding for security for costs prior to the trial, the defendant may shew that the plaintiff is an undischarged bankrupt in order that he may get such security. It seems rather strange that that should be so, but be that as it may, and assuming that he may be allowed to shew in the present proceeding that the plaintiff is an undischarged bankrupt, does that entitle him to have security for costs from the plaintiff? It is quite clear that mere poverty is not a sufficient ground for making a plaintiff give security for costs. It is alleged here that the plaintiff is a mere nominal plaintiff. This cannot be said of him in the usual sense in which it is said in these cases,

(1) 16 Q. B. D. 548. (2) 31 Ch. D. 34.

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Lord Esher, M.R.

viz., that he is a person really put forward by some other person behind him to bring an action on behalf of that person. It is said that he is a nominal plaintiff, because, if he recovers the money claimed, he will hold it as trustee for his trustee in bankruptcy. I doubt whether this can be said in the proper sense of the words. If he recovered in the action, the only Court I think that could interfere would be the Bankruptcy Court, to which the trustee would have to make an application that the money should be paid to him. But suppose it could be said that the plaintiff would be a trustee of the money recovered, would it follow that he could be said to be a mere nominal plaintiff in the sense that is requisite for this purpose? Suppose he succeeded in the action and were forced to pay over the money to the trustee; there is an order of the Bankruptcy Court suspending his discharge until he has paid five shillings in the pound, which by implication means that, when he has paid that amount, he is to get his discharge. So, even if the money has to be handed over as assets in the bankruptcy, the plaintiff gets a benefit from it, although his creditors get a benefit too. If he gets benefit from it, he is not a mere nominal plaintiff. It follows, I think, from what has been held in the Court of Appeal in *Rhodes* v. *Dawson* (1), that the mere fact of bankruptcy is not per se a sufficient reason why a plaintiff should be ordered to give security for costs. For these reasons I think this appeal should be dismissed.

FRY, L.J. I agree with the conclusion at which the Master of the Rolls has arrived in this case.

LOPES, L.J. In my opinion, this appeal cannot be maintained. The plaintiff let these premises to the defendant, and therefore the defendant is estopped from denying the plaintiff's title. But it is said that, nevertheless, the plaintiff, being an undischarged bankrupt, ought to be made to give security for costs unless the trustee is made a plaintiff. In *Rhodes* v. *Dawson* (1), on a somewhat similar application for security for costs, the whole matter was carefully considered; and it seems to me that the question in

(1) 16 Q. B. D. 548.

this case is really answered by the judgment in that case, where a passage from Chitty's Archbold (vol. i., p. 398) is cited with approval, such passage being to the following effect: "The plaintiff will not be compelled to give security for costs merely because he is a pauper, or bankrupt, or insolvent, and this even in a qui tam action; and this rule applies where the plaintiff is a trustee of a bankrupt and is suing for the benefit of the estate, or where the plaintiff is suing as executor for the benefit of the testator's estate."

With regard to the question whether the plaintiff is a mere nominal plaintiff, I quite agree with what the Master of the Rolls has said. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *Oddy.*

Solicitor for defendant: *G. A. Hall.*

E. L.

[IN THE COURT OF APPEAL.]

April 24.

THE LONDON STEAMSHIP OWNERS' INSURANCE COMPANY *v.* THE GRAMPIAN STEAMSHIP COMPANY.

Insurance, Marine—Running-down Clause—Collision—Insurance against Sum paid by Assured for Damage to other Ship—Liability of Shipowner when both Ships to blame.

Where there is a collision between two vessels, by which one of them is more damaged than the other, and, both being to blame, they have to share the damage equally, there is not a cross liability on the part of each vessel to pay half of the damage sustained by the other, but one liability only, viz., the liability of the vessel less damaged to pay to the vessel more damaged one half of the amount by which the damage to the one exceeds the damage to the other.

Therefore the owner of the more damaged vessel in such a case is not entitled to recover upon an insurance effected by him against liability for damage to another vessel by collision with his vessel:—

So *held* by the Court of Appeal, affirming the judgment of the Queen's Bench Division.

APPEAL from the judgment of the Queen's Bench Division upon a special case. (1)

The facts are fully stated in the report of the case in the Court

(1) Ante, p. 32.

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below; but for the purposes of this report they may be more briefly stated as follows:—

The defendants being indebted to the plaintiffs in a sum of 51*l.*, for which the action was brought, they sought to set-off a like amount under the after-mentioned circumstances. The plaintiffs were a mutual marine insurance association, composed of various classes or clubs. By the rules of Class V., called "The Protecting," it was provided (rule 6) that the risks, events, and occurrences in respect of which members should be entitled to protection were (inter alia), "Loss of or damage to any other vessel so far as such loss or damage is not covered by the usual form of Lloyd's policy, with the clause commonly known as the running-down clause attached"; and (rule 7) that in case any member should, by reason of his interest in any steamship entered for protection under these rules at the time of the happening of any event or occurrence specified in the last preceding rule, "become liable for and be required to pay any claim or demand," such member should be entitled to recover, and the members should, subject to the provisions in the rules contained, contribute to satisfy and make good the amount of such claim or demand. The defendants were owners of a steamship called the *Balnacraig*, which was entered under Class V. of the plaintiffs' association. The *Balnacraig* was insured by policies in the usual form of Lloyd's policy, with the running-down clause attached; such clause provides that, if the ship insured shall come into collision with any other ship, and the assured shall in consequence thereof become liable to pay and shall pay any sum or sums not exceeding the value of the vessel insured, the assurers will severally pay the assured such proportion of three-fourths of the sum so paid as their respective subscriptions bear to the value of the said ship. The *Balnacraig* came into collision with another steamship called the *Karo*, both vessels being to blame. Both vessels were damaged, but the damage sustained by the *Balnacraig* largely exceeded that sustained by the *Karo*. It was stated in the special case that, both vessels being to blame for the collision, if there had been cross-actions or claim and counter-claim by the owners of the respective vessels, the decree which would have been pronounced by the Admiralty Division would in the

usual form have adjudged that the damage arising from the collision ought to be borne equally by the owners of the two vessels, and would have condemned the owners of the *Karo* in half the damage sustained by the *Balnacraig*, and the owners of the *Balnacraig* in half the damage sustained by the *Karo;* and that as a matter of fact the owners of the *Karo* paid to the defendants as owners of the *Balnacraig* a sum equal to the difference between half of the amount of the damage sustained by the *Karo*, and half of the amount of the damage sustained by the *Balnacraig*, that being the sum for which the defendants as owners of the *Balnacraig* would have been entitled to issue a monition, if a decree of the Admiralty Division had been obtained as aforesaid. Upon these facts, the contention of the defendants was that the case must be treated on the footing of cross liabilities as between the owners of the two vessels, and they must be considered for the purposes of their insurance with the plaintiffs to have paid to the owners of the *Karo* half of the damage sustained by that vessel by way of deduction from half the amount of their own damage; that three-fourths of the sum so paid was recoverable by them under the running-down clause in their Lloyd's policies, and the remaining fourth was therefore recoverable from the plaintiffs; and that they were therefore entitled to set off such amount against the plaintiffs' claim. The plaintiffs contended that the case must be treated on the footing of a single liability on the part of the owners of the *Karo* to pay to the defendants one-half of the difference between the amounts of the damage sustained by the two ships respectively, and that consequently the defendants had never become liable to pay or paid any demand in respect of damage to the other vessel, and were not entitled to recover anything against the plaintiffs. The Queen's Bench Division (Mathew and Wills, JJ.) gave judgment for the plaintiffs.

Gorell Barnes, Q.C. (*Arthur Russell*, with him), for the defendants. The question is, whether the case is to be treated on the footing of a single liability or that of cross liabilities. Previously to the decision of the House of Lords in *Stoomvaart Maatschappy Nederland* v. *Peninsula and Oriental Steam Navigation Co.* (*The*

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Khedive) (1), the doctrine prevalent was that in these cases each ship was to be considered as receiving half its damage from the other ship: *Chapman* v. *Royal Netherlands Steam Navigation Co.* (2). The case of *Stoomvaart Maatschappy Nederland* v. *Peninsula and Oriental Steam Navigation Co.* (*The Khedive*) (1), no doubt, decides that that is not so where the question is as to the rights of the shipowners inter se. But it is contended that that decision does not affect the question in the present case, where the question arises on an insurance between the shipowner and the insurers. In substance, the defendants have paid in account half the damage to the *Karo*, and therefore are entitled to recover in respect of such payment against the plaintiffs. The view contended for by the plaintiffs would lead to the most extraordinary results. If both vessels were equally injured, both being to blame, neither would ultimately actually pay or receive anything. According to the plaintiffs' view, in that case there would be no liability under a collision clause at all.

Cohen, Q.C. (*B. A. Cohen*, with him), for the plaintiffs. The collision clause is not wanted in the case lastly suggested, because there the shipowner would recover the damage to his ship under the ordinary insurance on the ship. [He was stopped by the Court.]

LORD ESHER, M.R. The whole question is what the policy means as applied to the state of things that has arisen; and the question what that state of things must be considered to have been is governed by the decision in the case of *Stoomvaart Maatschappy Nederland* v. *Peninsula and Oriental Steam Navigation Co.* (*The Khedive*). (1) That case, it is true, had no relation to a policy of insurance. It had to do with the liabilities of the shipowners where ships had been in collision. It was there held, however, that, if two ships have come into collision, and both are damaged, both being to blame, according to the Admiralty law, there can be only one liability. Conceivably there may be none, if the damages to the two vessels respectively are exactly equal. But if the damage to one ship exceeds the damage to the other, there will be a monition that the owners of the ship

(1) 7 App. Cas. 795. (2) 4 P. D. 157.

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least damaged shall pay to the owners of the other ship half the difference between the amounts of damage sustained by the two ships respectively. The case determines point blank that there is only one liability, and therefore there can be only one payment. It does not signify whether the two suits are heard together or not. The Court of Admiralty held that, where one suit was heard at one time, the other suit must be heard before the monition issued, and it must be withheld until the cross-suit should be brought to hearing. The amount of the conjoint damage has to be divided equally, and in order to do this there must be a sum in arithmetic stating the amounts respectively; but, as the result of the arithmetic, there is only one liability, not cross liabilities. Such having been held to be the legal result of what took place, we must consider the policy and the effect of its language by the light of that decision. The words of the collision clause are as plain as can be. The material words are, "If the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay and shall pay any sum or sums not exceeding the value of the said vessel hereby insured." It is obvious that this clause does not apply to damage done to the ship of the assured. There may or may not be any insurance as to such loss. The clause would be a perfectly good insurance in respect of damage to another ship, if it stood alone. In respect of damage to the ship of the assured, the liability of the underwriters depends on the other part of the policy. The liability for damage to another ship is not within the other part of the policy, and therefore this running-down clause is wanted. What, then, is the liability under it? It is to pay any sum that the assured shall become liable to pay and shall pay in consequence of collision with another ship. It is quite plain when those words are applied to the circumstances of this case, viewed by the light of the decision in the case I have referred to, that, where the assured was under no liability to pay any sum to the owners of the other ship, and still more where the assured had to be paid something by them, the clause does not apply. For these reasons, I think the judgment below was correct, and this appeal must be dismissed.

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FRY, L.J. The defendants were the owners of the *Balnacraig*, and in respect of that vessel were members of the plaintiffs' association. By rule 6 of Class V. of that association the plaintiffs undertook to indemnify the defendants against loss of or damage to any other vessel so far as not covered by the usual form of Lloyd's policies with the clause commonly known as the "running-down clause" attached; and by rule 7 it was provided that in case any member should, by reason of his interest in any steamship entered for protection under the rules at the time of the happening of any event or occurrence specified in the last preceding rule, become liable for and should be required to pay any claim or demand, such member should be entitled to recover, and the members of the association should, subject to the provisions in the rules contained, contribute to satisfy and make good the amount of such claim or demand. In this case the suggestion is that the owners of the *Balnacraig* became liable to a claim or demand within those rules, and that, in fact, there were cross liabilities as between the two ships. That is the very opposite of what was determined in the case of *Stoomvaart Maatschappy Nederland* v. *Peninsula and Oriental Steam Navigation Co.* (1), where it was decided that there was in such cases one liability only. The defendants never became liable for, and never were required to pay, any claim or demand. Therefore they cannot be entitled to recover in respect of their insurance with the plaintiffs. For these reasons, I think the appeal must be dismissed.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Parker, Garrett, & Parker.*
Solicitors for defendants: *Waltons, Bubb, & Johnson.*

E. L.

(1) 7 App. Cas. 795.

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Criminal Law—Assault—Dismissal of Complaint—Withdrawal of Charge before Hearing—Certificate of Dismissal—Subsequent Action in respect of same Assault—24 & 25 Vict. c. 100, ss. 44, 45.

A certificate under 24 & 25 Vict. c. 100, s. 44, of the dismissal by a magistrate of a charge of assault, can only be granted where there has been a hearing "upon the merits," and both parties have attended before the magistrate, and there has been a proper inquiry into the facts of the case. Where, therefore, a prosecutor gave notice to a person against whom he had obtained a summons for an assault, that he should not attend before the magistrate or offer evidence in support of the summons, and did not in fact attend or offer evidence, but the person charged attended and obtained from the magistrate a certificate of dismissal under the above section:—

Held, that there had not been a hearing upon the merits; that the magistrate had no jurisdiction to grant the certificate; and that the certificate was therefore no bar under s. 45 to a subsequent action in the county court to recover damages in respect of the same assault:

Held, further, by Lord Esher, M.R. (Lord Coleridge, C.J., doubting), that upon the trial of the action in the county court the judge had power to inquire into the validity of the certificate, and to consider whether the magistrate in granting it had acted within his jurisdiction.

APPEAL from the judge of the Lambeth County Court. The action was brought against a police-constable to recover damages for an assault alleged to have been committed by him upon the plaintiff; the assault was denied, and there was a further ground of defence, that a summons had been taken out by the plaintiff against the defendant before a metropolitan police magistrate in respect of the same assault, which summons had been dismissed and a certificate of its dismissal given to the defendant under s. 44 of 24 & 25 Vict. c. 100 (2), and that the certificate was by s. 45 of the same statute a bar to the action.

(1) The case was heard before Lord Esher, M.R., and Lord Coleridge, C.J., sitting as a Divisional Court.

(2) By 24 & 25 Vict. c. 100, s. 44: "If the justices, upon the hearing of any such case of assault or battery upon the merits .... shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."

By s. 45: "If any person, against whom any such complaint .... shall have been preferred .... shall have obtained such certificate .... he shall be released from all further or other proceedings, civil or criminal, for the same cause."

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It appeared that upon an information sworn by the plaintiff at the Lambeth Police Court a summons in respect of the assault had been granted against the defendant, and served upon him; but before the day on which the summons was made returnable written notice was sent on behalf of the plaintiff to the defendant and to the Court that the plaintiff would not attend at the police court or offer any evidence in support of the summons. Upon the return day the plaintiff did not attend, and no evidence was given in support of the summons; but the defendant attended, and the summons was dismissed. The defendant then made a statement as to the facts of the case to the magistrate, and applied for and obtained a certificate of dismissal. Evidence to this effect having been given in the county court, the judge ruled that the certificate, having been given without any hearing upon the merits, did not operate as a bar to the action, and the jury eventually found a verdict for the plaintiff. The defendant appealed.

March 21. *Horace Avory*, for the appellant. The certificate is a bar to the action. The summons was properly dismissed by the magistrate, no evidence having been offered on behalf of the prosecution; and the defendant, having attended upon the summons, was entitled to a certificate that the summons had been dismissed. [He was stopped by the Court.]

J. F. Rawlinson, for the respondent. It is admitted that the magistrate had jurisdiction to dismiss the summons; but the certificate was bad as having been granted without jurisdiction, and is no bar to the action in the county court. Under s. 44 of 24 & 25 Vict. c. 100, such a certificate can only be granted where there has been a hearing upon the merits, in which respect the language of the section is different from that of s. 27 of 9 Geo. 4, c. 31, which authorized the certificate to be given "upon the hearing" where the charge was dismissed; under that section it was not necessary that the facts should be gone into. But under the later Act some facts must be heard, otherwise it cannot be said that there has been a hearing upon the merits. The fact that the plaintiff has offered no evidence in support of a summons for misdemeanor does not under 24 & 25 Vict. c. 100, ss. 44, 45,

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deprive a complainant of his common law right to bring an action for the same injury. It is true that an action will not lie to recover damages for a felony committed by the defendant until the felon has been prosecuted; but the same rule does not apply to misdemeanours, in respect of which a man has a right at common law to prosecute for the public wrong and sue for the private injury. [He cited *Nicholson* v. *Booth* (1); *Wells* v. *Abrahams* (2); *Wellock* v. *Constantine* (3); *Ex parte Ball, In re Shepherd.* (4)]

Horace Avory, in reply. The issue of the summons gave the magistrate jurisdiction over the case, and its withdrawal did not deprive him of his jurisdiction. It is admitted that he acted rightly in dismissing the summons, and having jurisdiction to dismiss it he had no jurisdiction to refuse the defendant a certificate of dismissal, for the granting of such a certificate has been held under the former statute of 9 Geo. 4, c. 31, s. 27, to be a purely ministerial, and not a judicial act: *Hancock* v. *Somes.* (5) The certificate was perfectly good on the face of it, and the county court judge had no jurisdiction to go behind it for the purpose of inquiring whether there had been a hearing on the merits; the only proper mode of determining that question is by a motion for a certiorari to bring up and quash the certificate.

Cur. adv. vult.

March 28. LORD ESHER, M.R. I am of opinion that this appeal must be dismissed. The action was one to recover damages for an assault; the assault was disputed by the defendant, but was found by the jury to have been committed. The defendant put forward as a defence to the action a certificate given by a magistrate under the provisions of 24 & 25 Vict. c. 100, s. 44, and the county court judge received evidence, apparently without objection, as to the circumstances under which the certificate was granted. It appeared that the plaintiff had originally laid an information for the same assault, and had obtained a summons against the defendant, but that before the summons came on for hearing the plaintiff had given the defendant notice that he did

(1) 57 L. J. (M.C.) 43.
(2) Law Rep. 7 Q. B. 554.
(3) 2 H. & C. 146.
(4) 10 Ch. D. 667.
(5) 1 E. & E. 795.

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not intend to proceed with it. The defendant did what had been done under a previous statute; he went before the magistrate and stated his case to him, and asked for a certificate of dismissal of the summons; this the magistrate gave him, and the question for us is whether it was competent for him to do so. That he had jurisdiction to dismiss the summons is not denied; but he also gave the certificate of dismissal; and we have to say, firstly, whether he had any jurisdiction to give that certificate; and, secondly, whether, if he had no such jurisdiction, the county court judge was entitled to go into the circumstances under which it was given, with a view of deciding whether the magistrate was right in holding that the case came within the purview and operation of the statute.

The first question depends on the construction of the statute, which is not a mere consolidation Act, but has made sundry alterations in the law contained in former Acts of Parliament relating to criminal law. The language of s. 27 of 9 Geo. 4, c. 31, is less precise than that of the section under consideration; it says that "upon the hearing" of a case of assault the justices are in certain circumstances to dismiss the complaint and to give a certificate of dismissal to the party against whom the complaint was made, and upon that section and those words two cases were decided. In *Tunnicliffe* v. *Tedd* (1) the circumstances were substantially the same as in the present case; an information was laid and a summons obtained for an assault; but upon the case being called, and the defendant pleading not guilty, the prosecutor declined to offer any evidence or proceed further with the information; and thereupon, although no evidence had been given, the justices, upon the defendant's application, granted him a certificate of dismissal. An action having been brought for the same assault, the Court of Common Pleas held that what passed before the justices constituted a hearing under s. 27, and was therefore, under s. 28, a complete bar to the action. That appears to me rather a technical and strict interpretation of the section; but the decision was approved in *Vaughton* v. *Bradshaw* (2), where the facts were on all-fours with those in this case; the prosecutor took out a summons, but before the day of hearing gave notice

(1) 5 C. B. 553. (2) 9 C. B. (N.S.) 103.

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to the defendant not to attend, and also gave notice to the magistrates' clerk that he (the prosecutor) should not attend; the defendant attended, the summons was dismissed, and a certificate of dismissal granted, notwithstanding the prosecutor's absence; and the Court of Common Pleas held that the certificate was rightly granted and was a bar to a subsequent action in the county court for the same assault.

Coming to the later Act, 24 & 25 Vict. c. 100, we find that the language of s. 44 is in a very important respect different; it gives a like power to justices to grant a certificate of dismissal; but it is to be exercised "upon the hearing of any such case of assault or battery *upon the merits*." How are those additional words "upon the merits" to be interpreted? Can we say that the new section which contains them means the same thing as the old section where they were omitted? Speaking for myself, I cannot help thinking that the strict interpretation which had been placed on s. 27 of the Act of Geo. 4 had been brought to the attention of the Legislature, and that those words were advisedly inserted, the intention being that if the dispute between the parties were really fought out upon the hearing of the summons and the charge dismissed, the certificate should be given and should bar all further proceedings, but that if the charge were withdrawn, so that there was no real trial, it should be left open to the person who had laid the information to be remitted to his common law rights and to maintain an action for the assault notwithstanding the dismissal of his complaint. If that be so, no certificate of dismissal can be given under 24 & 25 Vict. c. 100, s. 44, unless the parties are present before the justices, and the case is argued and is decided upon the facts, or upon the law applicable to the facts. In my opinion, that is the correct view of the law, and the magistrate had, therefore, no jurisdiction to grant this certificate.

We have also to consider whether the county court judge was entitled to consider the circumstances under which the certificate was given, or whether he was bound by the mere production of the certificate; in other words, whether the only mode of getting rid of the certificate was not by getting it quashed upon certiorari. The point is a technical one. Looking at the two cases

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which I have already discussed, it seems that in *Vaughton* v. *Bradshaw* (1) the county court judge did take evidence of what passed before the justices upon the granting of the certificate; while in *Tunnicliffe* v. *Tedd* (2) evidence was received at nisi prius upon the point whether the justices acted within their jurisdiction; and it seems to me that the Courts have recognised the right of the Court trying such an action for assault to inquire whether the facts are such as to give it jurisdiction to hear the cases. I think, therefore, that the county court judge had jurisdiction to inquire whether the certificate was properly given; and as he was right upon both points, this appeal must be dismissed.

LORD COLERIDGE, C.J. I have come reluctantly to the same conclusion. Upon the first point, I entirely agree with the Master of the Rolls; it is impossible without exercising an unreasonable amount of subtlety to say that the hearing of a case and the hearing of a case upon the merits are the same thing, and to disregard the insertion of those very important words. I think there is a clear difference in meaning between the two sections, and that the later statute requires a more complete and substantial hearing of the charge than the earlier one did, and therefore, although the two cases referred to by the Master of the Rolls were an authority upon the old Act of Parliament, they are no longer an authority, and cannot affect the interpretation of the new Act.

Upon the second point, I feel very much more doubt, and I confess that I rather yield to the opinion of the Master of the Rolls than express any clear opinion of my own to the effect that the county court judge had power to go behind the certificate of a magistrate of competent jurisdiction and to inquire whether, in face of the certificate, there was jurisdiction in the magistrate to grant it. I am unable, however, to deny that there have been cases where that has been done, and I do not feel at liberty to differ from the view which has been expressed by the Master of the Rolls.

Appeal dismissed.

Solicitors for plaintiff: *Bordman & Co.*

Solicitors for defendant: *Wontner & Sons.*

(1) 9 C. B. (N.S.) 103. (2) 5 C. B. 553.

W. J. B.

THE QUEEN *v.* THE JUSTICES OF GLAMORGANSHIRE. 1890

April 28.

Sessions — Practice — Appeal from Conviction — Recognizance out of Time— Estreat of—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* (3).

By s. 31 of the Summary Jurisdiction Act, 1879, it is provided that, "where any person is authorized by this Act or by any future Act to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court, subject to the conditions and regulations following":—

(3.) "The appellant shall, within the prescribed time, or, if no time is prescribed, within three days after the day on which he gave notice of appeal, enter into a recognizance . . . conditioned to appear at the said sessions and to try such appeal, and to abide the judgment of the Court of Appeal thereon, and to pay such costs as may be awarded by the Court of Appeal":—

Held, that a recognizance which has been entered into by the appellant after the expiration of the three days is not void, and that the court of quarter sessions, although by reason of the recognizance being out of time it has no jurisdiction to hear the appeal, has jurisdiction to estreat the recognizance for non-payment of such costs as may have been awarded upon the dismissal of the appeal.

CERTIORARI to bring up, for the purpose of quashing it, an order of quarter sessions estreating a recognizance.

One John Elliott was on July 3, 1889, convicted at the petty sessions at Cardiff of the offence of selling beer by retail without a licence. On July 6 he gave notice of appeal to the quarter sessions. On July 12 a recognizance to prosecute the appeal was entered into by Elliott in a sum of 50*l.* and by two sureties in sums of 25*l.* each, the time for entering into such recognizance limited by s. 31, sub-s. (3), of the Summary Jurisdiction Act, 1879, having expired on July 9. The recognizance was in the usual form: see Archbold's Quarter Sessions, 4th ed. p. 665.

The appeal came on for hearing on October 16, when objection was taken by the respondent that the recognizance was out of time and that there was no jurisdiction to hear the appeal. The quarter sessions allowed the objection, and dismissed the appeal with costs. The costs of the respondent were taxed at 21*l.* 8*s.* 9*d.*; and application for payment of the same was made to the recognizors, but they were not paid. The respondent then gave notice to the recognizors that he would apply at the next court

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of quarter sessions for an order that the recognizance should be estreated; and accordingly on December 31 he did so apply, and the quarter sessions ordered the recognizance to be estreated. A rule was then obtained in the Queen's Bench Division on behalf of the recognizors, calling on the justices to shew cause why a certiorari should not issue to bring up the order estreating the recognizance in order that it might be quashed.

W. D. Benson, for the justices, shewed cause. The recognizance, though too late to allow of the appeal being successful, was not therefore void. The recognizance is a bond whereby the appellant binds himself to the Crown not merely to prosecute the appeal, but also to pay such costs as the Court may award. The bond can only be avoided by the performance of all its conditions. If the recognizance cannot be estreated the respondent is without any summary remedy for his costs, for the power of enforcing payment of such costs by distress warrant given by s. 27 of 11 & 12 Vict. c. 43, is limited to cases in which "the party ordered to pay the same shall not be bound by any recognizance conditioned to pay such costs."

Abel Thomas, in support of the rule. The appellant's right of appeal was subject to his strict compliance with the requirements of the statute. On July 12 his right of appeal was gone, and the recognizance entered into at that date, being conditioned to try an appeal which could never be tried, was a mere nullity. The appellant having no possibility of trying his appeal, the consideration in respect of which the bond was given wholly failed. The recognizance cannot be bad for one purpose and good for another.

HUDDLESTON, B. I am of opinion that this recognizance was not void, and that the quarter sessions had jurisdiction to estreat it. A recognizance is stated in Burn's Justice tit. Recognizance to be "a bond of record testifying the recognizor to owe a certain sum of money to some other." The form of a recognizance taken by justices of the peace as a condition of appeal is that given in Archbold's Quarter Sessions, 4th ed. p. 665: "Be it remembered that . . . . C. D., of ——, and J. K., of ——, and

L. M., of ——, ... acknowledged themselves to owe to our said Lady the Queen the sum of —— pounds each, to be made and levied of their goods and chattels, lands, and tenements respectively, to the use of our said Lady the Queen her heirs and successors, if default be made in the condition following; . . . . Now, the condition of this recognizance is such that"; then come the conditions prescribed by s. 31, sub-s. (3), of the Summary Jurisdiction Act, 1879—"if the above bounden C. D. shall personally appear at the next general quarter sessions of the peace . . . and there try such appeal, and abide the judgment of the said court of quarter sessions thereupon, and pay such costs as shall be by the said court awarded, then this recognizance to be void." It is only to be avoided if the appellant performs all three of the above conditions. But here he never performed the last condition, that of payment of the costs of the appeal; therefore the recognizance held good. The appellant, knowing that he had made default in the matter of the recognizance, and that he consequently had no right of appeal, thought he would take his chance of the objection being taken, and would go to the quarter sessions to get rid of his conviction if he could, and then, if the objection were taken, would turn round and say that the recognizance was void, and so escape liability for the cost of the unsuccessful appeal. But that he cannot be permitted to do. This rule must be discharged.

GRANTHAM, J. I am of the same opinion.

Rule discharged.

Solicitors for recognizors: *Riddell, Vaizey & Co., for J. H. Jones, Cardiff.*

Solicitors for justices: *Andrew, Mellor & Smith, for Wheatley, Cardiff.*

J. F. C.

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OVERSEERS OF MANCHESTER, APPELLANTS; GUARDIANS OF ORMSKIRK UNION, RESPONDENTS.

Poor Law—Settlement—Illegitimate Child under Sixteen—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

Under s. 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), an illegitimate, like a legitimate, child cannot gain a settlement for itself while under the age of sixteen, but must follow the settlement of its mother.

SPECIAL CASE stated by consent under 12 & 13 Vict. c. 45, s. 11, from which the following facts appeared.

The respondents had obtained an order of justices adjudging the place of the last legal settlement of Eleanor Bailey, a pauper, and her illegitimate child to be in the appellants' township.

The pauper, Eleanor Bailey, a single woman, was the illegitimate daughter of Emily Bailey, and was born at Worsley, near Manchester (without the appellants' township), in June, 1874, and remained there till December, 1876, when she was taken by her mother to Manchester to the house of her mother's aunt, Martha Corrigan, where she and her mother resided together within the appellants' township until June, 1877.

In June, 1877, the pauper's mother left Manchester and went into service in the township of North Meols, within the respondents' union, where she had ever since resided, never having received parochial relief. She left her daughter, the pauper, at Manchester with Martha Corrigan, with whom the pauper resided within the appellants' township until December, 1881. From that month until June, 1882, the pauper resided with Martha Corrigan, at Harpurhey, within the Prestwich Union, when Martha Corrigan died; thenceforward, until December 6, 1888, the pauper resided with Marion Corrigan, the daughter of Martha Corrigan, viz., at Harpurhey, to November, 1883; at Manchester, within the appellants' township, from November, 1883, to February, 1887; and at Cheetham, within the Prestwich Union, from February, 1887, until December 6, 1888, on which day the pauper was fetched by her mother from Marion Corrigan's at Cheetham and taken to North Meols, within the respondents'

union, where she remained and resided, supported by her mother and at her mother's expense, until February, 1889, when she (the pauper) was admitted into the respondents' workhouse at Ormskirk, where her child was born.

[The case then proceeded to set out facts relating to the visits of the pauper to her mother, and of the latter to the pauper, while the pauper was residing with the Corrigans, and stated that the pauper's mother paid nothing either to Martha or Marion Corrigan for the pauper's maintenance, but occasionally bought for her articles of clothing.]

The respondents contended, and the appellants denied, that upon the facts stated in the case the pauper and her child were settled in the appellants' township by reason of an uninterrupted residence therein of the pauper for a period of three years, under the provisions of 39 & 40 Vict. c. 61, s. 34.

The question for the Court was whether or not the legal settlement of the pauper and her child was in the township of Manchester.

Aspland, Q.C. (*Overend Evans*, with him), for the appellants. The question of desertion of the pauper by her mother does not arise upon the facts of this case, for before the pauper had become chargeable the mother had resumed control and was providing for her, and the question, therefore, is whether an illegitimate child under sixteen can acquire a settlement for itself by residing apart from its mother. The case is really concluded by the judgments of the House of Lords in *Guardians of Reigate* v. *Guardians of Croydon* (1), the effect of which decision is to fix sixteen as the age of emancipation for all children, whether legitimate or illegitimate; by necessary inference from that decision they cannot, while under that age, acquire a settlement at all. The first clause of s. 35 of the Divided Parishes Act, 1876 (2), is a distinct enactment to that effect so far as regards

(1) 14 App. Cas. 465.

(2) By s. 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61): "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and

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legitimate children, and the second clause, which provides that "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement," must necessarily be read, "until such child, being over sixteen, acquires another settlement"; otherwise there would be a serious and unnecessary difference in the law as to the acquisition of settlements by legitimate and illegitimate children under sixteen. That it was the intention of the Act to assimilate the positions of legitimate and illegitimate children is clear from a perusal of the judgment of Lord Watson in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (1). At p. 483 occurs the phrase, "making due allowance for the differences arising from the circumstance that in law a bastard has no father, the practical effect of the second clause of s. 35 is to place illegitimate, as nearly as may be, on the same footing with legitimate children." The judgment of Lord Macnaghten is to the same effect. It is true that no part of s. 71 of 4 & 5 Wm. 4, c. 76, which for the common law rule that an illegitimate child took its birth settlement substituted the rule that it should follow its mother's settlement "until it shall attain the age of sixteen, or shall acquire a settlement in its own right," has been expressly repealed; but the second clause of s. 35 of the Divided Parishes Act supersedes the words "or shall acquire a settlement in its own right." [He was stopped by the Court.]

Smyly, for the respondents. The argument for the appellants does violence to the language of the House of Lords in *Guardians of Reigate* v. *Guardians of Croydon* (1); what was there decided was that an illegitimate child over sixteen was put on the same footing as a legitimate child over that age; this seems clear from the language of Lord Watson (at p. 484), where he says the effect of s. 35 is "to give to bastards the privilege enjoyed by lawful children of retaining their parentage settlement after emancipation until the acquisition of a new settlement." It is true that Lord Watson said, in another part of his judgment,

shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement."

(1) 14 App. Cas. 465.

that the practical effect of the second clause was to place illegitimate children as nearly as may be on the same footing as legitimate children; but he was then dealing with a question arising as to children over sixteen; had he been dealing with the status of illegitimate children under sixteen he would have dealt with 4 & 5 Wm. 4, c. 76, s. 71, and with the decisions that illegitimate children under that age can acquire a settlement. Under that Act it had been decided in *Bodenham* v. *St. Andrew, Worcester* (1), that an illegitimate child could only retain its mother's settlement until sixteen, when, if it had acquired no settlement in its own right, its birth settlement revived; and a series of cases, among which was *Reg.* v. *Leeds Union* (2), followed, shewing that an illegitimate child under sixteen could acquire a settlement for itself. In this state of the law the Divided Parishes Act, 1876, was passed, which by s. 35 provided that the mother's settlement should be retained after the age of sixteen, the effect of that section when read in connection with the previous Act being that an illegitimate child could acquire a settlement under sixteen, but if it had not done so it retained its mother's settlement after that age until it acquired a settlement for itself. In other words, the Act of 1876 only deals with the period in the life of an illegitimate child after that dealt with in 4 & 5 Wm. 4, c. 76. The expression "as near as may be" in the passage cited from Lord Watson's judgment means, "as near as existing legislation will allow."

The facts shew an abandonment by the mother sufficient to enable the pauper to gain a settlement for herself: *Reg.* v. *Leeds Union.* (2)

[The following cases were also cited during the arguments:—*Guardians of West Derby Union* v. *Guardians of Atcham Union* (3); *Guardians of Mitford and Launditch Union* v. *Guardians of Wayland Union.* (4)]

LORD COLERIDGE, C.J. I am far from saying that an ingenious argument might not be raised upon the phraseology of s. 35 of the Divided Parishes Act, for that section is so expressed as to afford many opportunities for argument; but we must look at

(1) 1 E. & B. 465.
(2) 4 Q. B. D. 323.
(3) 24 Q. B. D. 117.
(4) 24 Q. B. D. 122.

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the language there used as it has been interpreted by the highest Court of the realm. It has been pointed out by the Master of the Rolls in *Guardians of West Derby Union* v. *Guardians of Atcham Union* (1) (and I entirely concur with him), that where in the House of Lords one of the learned lords gives an elaborate explanation of the meaning of a statute, and some of the other learned lords present concur in the explanation, and none express their dissent from it, it must be taken that all of them agreed in it. Now a most elaborate explanation of the meaning of this section has been given in the case of *Guardians of Reigate Union* v. *Guardians of Croydon Union* (2), by Lord Watson, in whose judgment the Lord Chancellor and Lords FitzGerald and Macnaghten all concurred, while Lord Macnaghten gave the same explanation in different language; they decide in substance that the meaning of the Act of Parliament is as far as possible to assimilate the position of illegitimate to that of legitimate children. Heretofore there had been a difference in their positions in a variety of incidents; but by this statute Parliament intervened once for all, and the interpretation placed upon the statute is that a legitimate child under the age of sixteen shall not be capable of acquiring a settlement for itself, but shall follow its parentage settlement under that age, and that an illegitimate child is to be treated as far as may be as though it were legitimate; it cannot of course be in all respects so treated. Now it is admitted by the respondents that there would be nothing to be said on their behalf if the pauper were under sixteen and were legitimate; it must in that case take its parentage settlement, that of its father or mother; but we are asked to bring in the old Act of Wm. 4 for the purpose of differentiating the case of a legitimate from that of an illegitimate child in cases where the recent Act shews that it is not desired to make any such difference, and to fly in the face of the judgment of Lord Watson and the intention of the recent statute. The object of that statute has been explained by the House of Lords, and that object has been accomplished as far as it was possible to accomplish it; the matter is one which can be properly effected by legislation, and the conclusion to which I have come, following the evident

(1) 24 Q. B. D. 117. (2) 14 App. Cas. 465.

meaning of the judgments in the House of Lords, is that an illegitimate, like a legitimate, child cannot gain a settlement for itself while under the age of sixteen.

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MATHEW, J., concurred.

Appeal allowed.

Solicitor for appellants: *G. Featherstone Johnson, for Arthur Lings, Manchester.*

Solicitors for respondents: *Bower, Cotton & Bower, for Parr, Sadler & Dickinson, Ormskirk.*

W. J. B.

THE PHARMACEUTICAL SOCIETY *v.* WHEELDON.

Feb. 25; *April* 29.

Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *s.* 15—*Unregistered Assistant of Registered Chemist—Sale of Poison by—Liability of Assistant to Penalty.*

By s. 15 of the Pharmacy Act, 1868, it is provided that "any person who shall sell . . . . poisons . . . . not being a duly registered pharmaceutical chemist or chemist and druggist . . . . shall for every such offence be liable to pay a penalty or sum of 5*l.*":—

Held, that an unregistered chemist's assistant who, in the absence of his master, sells any poison or preparation containing poison as in that Act defined, is liable to a penalty under the above section, notwithstanding that he effects such sale on behalf of his master, and that his master is duly registered.

APPEAL from county court.

The defendant was the assistant of a duly qualified and registered chemist, but was not himself a registered pharmaceutical chemist or chemist and druggist within the meaning of the Pharmacy Act, 1868. On September 15, 1889, the defendant, being in sole charge of the shop of his employer, sold on behalf of his employer to a customer a packet of Battle's vermin killer, which is a preparation containing strychnine. By s. 2 of the Act it is provided that the several articles named in the schedule A shall be deemed to be poisons within the meaning of the Act, and that also any articles which the council of the Pharmaceutical Society may from time to time by resolution declare ought to be so deemed shall, subject to the approval of such resolution by the Privy Council, and the advertisement of such resolution and approval in the *London Gazette*, be similarly

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deemed to be poisons within the meaning of the Act. Among the articles named in schedule A is strychnine, and by a resolution of the council of the Pharmaceutical Society, duly approved by the Privy Council and advertised in the *London Gazette* of December 21, 1869, it was declared that (inter alia) preparations of strychnine, and every compound containing any poison within the meaning of the Pharmacy Act, 1868, when prepared or sold for the destruction of vermin, ought to be deemed to be poisons within the Act. The plaintiffs accordingly sued the defendant under s. 15 for a penalty of 5*l.* for having sold strychnine or a preparation thereof contrary to the provisions of the Act. The county court judge held the defendant liable. The defendant appealed.

Finlay, Q.C., and *J. F. Rawlinson* (*Ivor Bowen*, with them), for the defendant. The seller of the poison in this case was not the defendant, but his master, on whose behalf it was sold. The word "sell" in s. 15 is coupled with the words "or keep open shop for the retailing, dispensing, or compounding poisons." The collocation of those words shews that they were intended to refer to the same person, and as the assistant does not "keep open shop," so neither does he "sell." Sect. 17 may be prayed in aid of the defendant's contention, by which section it is rendered unlawful to sell any poison unless the box or bottle containing it is labelled with the name and address of the seller, and it is provided that for that purpose "the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller." There is no ground for drawing any distinction between the two sections as regards the person indicated by the term seller. The master cannot always be present in the shop, and consequently, as there are few doctors' prescriptions in which one or other of the scheduled poisons does not form an ingredient, it must follow, if the decision of the county court judge is to be upheld, that the business of a chemist cannot be carried on unless the assistant is himself a registered chemist. This the smaller chemist cannot afford. The result of supporting the judgment will be to extinguish the smaller chemists' shops—a hardship which the legislature never intended.

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Lumley Smith, Q.C. (*Granger*, with him), for the plaintiffs. The object of the Act was to prevent the risk of accidents arising from the sale of poisons by unqualified persons, and to throw difficulties in the way of persons desiring to purchase poison for felonious purposes. If the defendant's view is right, a person wishing to obtain a poison for such purposes need only watch until the master of a small shop goes out, and may then go in and buy it from the unqualified assistant. The words "sell or keep open shop" in s. 15 strike at two classes of persons—the assistant on the one hand, and the master on the other. In *Pharmaceutical Society* v. *London and Provincial Supply Association* (1), Lord Selborne deals with this very point, although it was unnecessary to the decision of that case. His Lordship says: "He who sells, whether he be master or servant, whether he be the principal or a person to whom the conduct and management of sales is delegated, is struck at by the 15th section; because otherwise a very wide door would be opened to the evils which the Act was intended to guard against" (at p. 886). And in the same case, in the Court of Appeal, Bramwell, L.J., said: "Who would be liable under s. 15 for compounding medicines of the British Pharmacopœia otherwise than according to its formularies? Surely the actual person compounding." Sect. 17, when providing that, in a case of a sale by a servant, the seller shall be deemed to be the person on whose behalf the sale is made, expressly limits that provision to the purposes of that section.

Rawlinson, in reply.

Cur. adv. vult.

1890. April 29. The judgment of the Court (Pollock, B., and Hawkins, J.), was delivered by

HAWKINS, J. This action was brought in the county court of Surrey, holden at Wandsworth, to recover from the defendant a penalty of 5*l.* for selling on September 15, 1889, poison, to wit, strychnine, or a preparation thereof known as Battle's vermin killer, without being legally qualified so to do. The facts are few and simple. The defendant was the assistant or servant of a duly qualified chemist, but he was not himself a registered

(1) 5 App. Cas. 857.

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pharmaceutical chemist, or a chemist and druggist within the meaning of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121).

On September 15, 1889, the defendant was in the sole charge of the shop of his employer, and while so in charge he sold on behalf of his employer a packet of Battle's vermin killer to a female who came as a customer to the shop.

Battle's vermin killer contains strychnine, which is a poison, and is deemed so to be by s. 2 of the said Act coupled with schedule A and certain additions to that schedule duly made in the month of December, 1869. The county court judge held the defendant liable under the 15th section of the Act, and gave judgment accordingly, giving the defendant, however, leave to appeal. That appeal was argued before us in the early part of Hilary Sittings. After hearing the arguments, and having regard to the general importance of the case, we reserved our judgment, not because we entertained any serious doubt upon the matter, but for the purpose of assuring ourselves we had overlooked nothing in favour of the appellant's contention. Having now carefully considered the subject, we are of opinion that the defendant is liable, that the county court judge was right, and that his decision ought to be affirmed.

The Act of Parliament, the 15th section of which we are called upon to construe, is entitled, "An Act to regulate the sale of poisons, and alter and amend the Pharmacy Act, 1852."

The preamble recites that, "it is expedient *for the safety of the public* that persons keeping open shop for the retailing, dispensing, or compounding of poisons, and persons known as chemists and druggists, should possess a competent practical knowledge of their business, and to that end that from and after the 31st of December, 1868, all persons not already engaged in such business should, before commencing such business, be duly examined as to their practical knowledge, and that a register should be kept as herein provided."

Sect. 1 makes it "unlawful for *any* person *to sell* or *keep open shop* for retailing, dispensing, or compounding poisons . . . . unless such person shall be a pharmaceutical chemist, or a chemist and druggist, within the meaning of that Act, and be registered under that Act."

Sect. 2 declares that the several articles named or described in the Schedule A. shall be deemed to be poisons. And on reference to that schedule strychnine will be found named, and in the addition thereto already referred to, "Every compound containing any poison, when prepared or sold for the destruction of vermin," is expressly included.

Sect. 3 declares that "chemists and druggists, within the meaning of that Act, shall consist of all persons who at any time before the passing of that Act have carried on in Great Britain the business of a chemist and druggist in the keeping of open shop for the compounding of the prescriptions of duly qualified medical practitioners, also of all assistants and associates who before the passing of that Act shall have been duly registered under or according to the provisions of the Pharmacy Act, and also of all such persons as may be duly registered under that Act."

And s. 4 gives facilities to be registered as chemists and druggists to persons who before the passing of that Act had been for three years employed in the dispensing and compounding of prescriptions as assistants to a chemist, subject to their passing such modified examination as the Council of the Pharmaceutical Society may declare to be *sufficient evidence of their skill and competency to conduct the business of a chemist and druggist.*

Sect. 15, upon the construction of which the present case depends, enacts that, "from and after the 31st December, 1868, *any* person *who shall sell* or *keep open shop* for the retailing, dispensing, or compounding poisons . . . . not being a duly registered chemist, or chemist and druggist . . . . or shall fail to conform with any regulation as to the keeping or selling of poisons made in pursuance of this Act . . . . shall for every such offence be liable to pay a penalty or sum of 5*l.*" It is not disputed that the plaintiffs' society is the proper body to sue for such penalty.

The 17th section renders it unlawful to sell any poison unless certain regulations therein prescribed are observed. It is not, however, necessary to refer more particularly to it than to state that for non-observance of those regulations certain penalties were imposed on the sellers, and that, "*for the purposes of that*

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section the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller."

It was contended by Mr. Finlay, on behalf of the appellant, that it was not unlawful under s. 15 for an unqualified assistant to a duly qualified chemist to sell poisons in his master's shop in the ordinary course of his master's business; that the sale by the appellant being a mere sale by him as a servant in the discharge of his duty, the master was, in law and in fact, the seller; and that as the master was qualified the sale was lawful. It was further suggested that great inconvenience and hardship would result to small chemists who could not afford to employ qualified assistants if we were to hold otherwise.

We do not agree in the view thus presented, nor are we at all impressed by the suggestion of inconvenience or hardship. Nothing to our understandings can be clearer than that the object of the Act was *beyond all other considerations* to provide for *the safety of the public*, and to guard, as far as possible, all members of the community from the disastrous consequences, so frequent in occurrence, arising from the sale of poisons by persons inadequately acquainted with their baneful properties, and the whole object of the Act would be frittered away, and the Act itself become a dead letter, were we to declare by our judgment that an unqualified assistant can lawfully and with impunity sell any of the poisons to which the Act applies, *unless upon each occasion of such sale he acts under personal superintendence of a qualified employer*, or of *a qualified assistant to such an employer*. By such personal superintendence we mean, not mere presence in the shop or room where the sale takes place, but actual personal superintendence, so that every individual sale shall be so guarded round by those precautions prescribed by the Act that the safety of every member of the public may be provided for as far as the law can accomplish that object.

Mr. Finlay, in the course of his argument, suggested that the legislature must have assumed that every qualified chemist keeping a shop would, if he required assistance, not be likely to employ an assistant other than one having competent knowledge and whose carefulness could be depended upon, and did not mean to enforce upon chemists the employment of no assistants but

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those duly qualified. This is true enough so far as regards the general business of a chemist's shop not involving the sale of such poisons as are contemplated by the Act. But it is otherwise when the assistant is to be entrusted with the sale of such poisons; to leave the selection of such an assistant, without regard to any qualification, to the discretion of his employer, would in our opinion be to defeat the object of the legislature. One employer in a large way of business might feel that his assistant ought to possess a knowledge of poisons and poisonous drugs equal to his own. Another in a small way of business might be contented to leave the management of his business to an assistant who, though he had knowledge of the general character of poisons, had but imperfect knowledge of their destructive properties, and of the various degrees of noxious strength contained in them. A third who was but seldom asked for poisonous drugs might think any person of ordinary intelligence sufficient. Whilst a fourth might, without thought of danger, be content to risk a mishap, and leave a mere servant in his household, who knew no more than that poison is poison, to represent him. In our opinion the intention of the legislature was expressly to provide against such a state of things by insisting upon one uniform qualification for every person who should sell, whether on his own account or for any other person, such dangerous commodities, namely, registration under the Act, based on a certificate of competent skill and knowledge granted after examination by examiners carefully selected and appointed for that purpose. With such a certificate the holder of it may fairly be deemed to possess knowledge not only of the general effect and operation of the various poisons with which he may be called upon to deal, but, what is quite as important, if not more so, for the public safety, knowledge as to the quantities in which each poison may be harmfully or beneficially taken, and the quantities in which, if taken, death or serious mischief would be inevitable.

The language of s. 17 fortifies us in the view we have taken, for in that section the legislature, where it intended that the person on whose behalf a sale is effected shall be deemed the seller, has said so in express words. We are also strongly

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fortified in our view by the judgments in the House of Lords in the case of *Pharmaceutical Society* v. *London and Provincial Supply Association*. (1) It is true the question in that case was different to that raised in the present; but the views entertained and expressed, particularly in the judgment of Lord Selborne, directly bear upon the point now at issue.

As regards the appeal made to us on behalf of the smaller chemists, we can only say that those who cannot afford to keep qualified assistants must, if they desire to absent themselves from their shops for greater or less periods of time, take such precautions as are within their power, either by locking up their poisons or by other means, to prevent any sale of them during their absence. It has been urged that it is hard to punish the servant for that which he has, in ignorance of the law, done in the interests of his master. This, however, is no answer to the action. We have only to deal with the law as its exists. We need hardly say that, if mischief arose by reason of a master negligently leaving an unqualified person in charge of his poisons, no punishment of the assistant under s. 15 would exonerate his master from his civil liability to any person injured, nor, if death ensued through such negligence (if a jury found it to be of a criminally culpable character), would he be exonerated from a liability to a charge of manslaughter. The object of the Act under discussion is, however, to prevent the occurrence of such mischief, and that can only be done by rigidly enforcing its provisions.

Our judgment, for the reasons above given, is for the respondents, and we dismiss this appeal with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Flux, Son & Co.*
Solicitor for defendant: *C. Taylor.*

(1) 5 App. Cas. 857.

J. F. C.

DAVIS & CO. *v.* HOWARD. 1890

Jan. 29, 30.

Stock Exchange—Broker and Principal—Usage of Stock Exchange, reasonableness of—Right of Broker to close Account in consequence of non-payment of Balance due from Principal.

In an action by stockbrokers, members of the London Stock Exchange, against their principal, it was proved that, according to the usage of the London Stock Exchange, it is competent to a broker, who has been instructed by his principal to carry over stock to the next settlement, to close his principal's account if a balance of differences in the broker's favour has not been paid to him by his principal upon the pay-day of the current settlement, provided that the broker has given his principal notice of the amount of the balance before the pay-day, and that the principal has not placed at the broker's disposal funds or available collateral security sufficient to cover the amount of the balance:—

Held, by Charles, J., that this usage was reasonable.

CASE tried before Charles, J., without a jury.

The plaintiffs, who were stockbrokers, and members of the London Stock Exchange, claimed to recover from the defendant, their principal, a sum of 66*l.* 1*s.* 5*d.* in respect of the sale by them at a loss, under an alleged usage of the Stock Exchange, of certain stocks and shares which they had been instructed by him to carry over, in consequence of his failure to pay on pay-day a balance due to them in respect of differences upon such stocks and shares.

Horne Payne, Q.C., and *A. G. McIntyre*, for the plaintiffs, referred to *Lacey* v. *Hill, Scrimgeour's Claim* (1), and *Lacey* v. *Hill, Crowley's Claim.* (2)

Finlay, Q.C., and *J. G. Witt*, for the defendant.

CHARLES, J. The right of the plaintiffs, who are stockbrokers and members of the London Stock Exchange, to recover from the defendant, their principal, the sum here claimed depends upon whether or not the plaintiffs were entitled as stockbrokers to close the defendant's account on March 15, 1889. For their right to do this the plaintiffs rely on a usage of the Stock Exchange, the existence of which must, I think, be taken to have been proved, but which, according to the contention of the learned counsel for the defendant, is unreasonable and therefore invalid.

(1) Law Rep. 8 Ch. 921. (2) Law Rep. 18 Eq. 182.

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It appears that the defendant commenced dealing in differences on the London Stock Exchange through the plaintiffs early in 1888. The course of business seems to have been always the same. Whenever upon the carrying-over day the result proved to be a balance in favour of the defendant, the plaintiffs sent him on pay-day a cheque for the amount; and similarly, from time to time, when the result upon the carrying-over day was a balance in favour of the plaintiffs, the defendant sent them a cheque on pay-day. Now, on March 12, 1889, which was carrying-over day, the plaintiffs, at the defendant's request, carried over his securities to the settlement of March 28, and sent him as usual an account, which this time shewed a balance in their own favour of 104*l.* 16*s.* 10*d.* On March 13 a letter was written to the defendant on the plaintiffs' behalf requesting him to let them have a cheque for this amount on the following day, March 14, which was pay-day. On that day the plaintiffs, not having received the cheque as requested, wrote to the defendant expressing surprise, and stating that if payment were not made before 12 o'clock on the next day, March 15, his account would be closed. On the morning of March 15 a telegram to the same effect was sent by the plaintiffs to the defendant's place of business. No cheque was sent, and on that day the plaintiffs closed the defendant's account and sold the securities at a loss, which with their commission constitutes the sum of 66*l.* 1*s.* 5*d.*, which they now seek to recover from the defendant. It appears that at the time the defendant was ill, and that he did not see the letter of the 14th or the telegram of the 15th until after his account had been closed. But the letter and telegram were sent by the plaintiffs, and contained ample notice of the course which the plaintiffs proposed to take.

The evidence given as to the usage relied upon by the plaintiffs was to the following effect:—A member of the plaintiffs' firm deposed: "If a man does not pay upon pay-day, that is, the third day of the settlement (the first being carrying-over day, the second name-day, and the third pay-day), we have a right to close his account." Another member of the Stock Exchange deposed: "If a client does not send his difference upon pay-day—that is, upon the third day of the settlement—it is within the pro-

vince of the broker to close the account which has been carried over." Mr. Pyrmont, a stockbroker of long standing, said: "Clients are bound to provide money for their brokers in order that they may pay before 3 o'clock on pay-day. All contracts for carrying over are made subject to the differences being paid on pay-day, and, failing payment on pay-day, a broker has a right to close every open transaction even without notice." But on cross-examination this witness modified his answer, and stated that in his opinion the broker, in order to give himself the right contended for, must have sent the account shewing the balance against his customer to the customer at all events upon the evening of the day before pay-day. Mr. Grant, the official assignee of the Stock Exchange, explained that the object of the usage was to protect the broker, and that it would not apply to a case in which the broker held sufficient cover to pay himself accruing differences Mr. Pyrmont also stated that the broker would not be entitled to exercise the right if he had deposited with him collateral security applicable to the particular differences. All these witnesses then agree that in the absence, as in the present case, of cover and collateral security appropriated to the liquidation of differences, this right of the broker does exist according to the usage of the Stock Exchange.

It is said that the usage thus proved is unreasonable. Now, at first sight, no doubt it appears unreasonable that it should be within the province of a stockbroker to close all the transactions of his principal because two days after the broker has made contracts on the principal's behalf on the Stock Exchange the principal fails to supply the broker with, it may be, a very small balance due on the previous account; but, on closer examination, and having regard to the peculiar nature of the business which a stockbroker does for his principal, I can see nothing unreasonable in this usage. It is admittedly reasonable where the principal is insolvent, or, if not actually insolvent, is in circumstances which give good reason for thinking that it may be difficult for him to meet his engagements. Its root and foundation is the peculiar position of the broker, who has to pay all his principal's differences out of his own pocket before 3 o'clock on pay-day, and who, if he does not do this by 11 o'clock on the following morn-

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ing, is liable to be declared a defaulter on the Stock Exchange. In such circumstances it is, in my opinion, very reasonable that the broker should have this right to protect himself. The learned counsel for the defendant argued that the broker ought not to be allowed to close the account unless he were in a position to prove either in a domestic tribunal or in a court of justice, if the matter should come before a court of justice, the actual or virtual insolvency of his principal at the time when the account was closed. I think that this would throw upon the broker an intolerable burden, and that the fact of the money of the principal not being forthcoming in time is and ought to be sufficient to entitle the broker to protect himself by taking the course which the plaintiffs have taken here. I also think that to decide otherwise would not be in accordance with existing authority. Though the specific usage which has here been proved has never yet been judicially decided to be valid, the principle upon which it rests has been recognised in decided cases. That principle is the right of the broker to protect himself in consequence of the peculiar position in which he is placed owing to the nature of the business which he transacts for his principal. I am, therefore, of opinion that the usage relied upon by the plaintiffs is reasonable and valid in point of law, and that, so far as it is concerned, they are entitled to succeed.

[The learned judge then adverted to other matters which are not considered material for the purposes of this report.]

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Morley, Shirreff & Co.*

Solicitors for defendant: *Tiddeman & Briggs.*

H. D. W.

CORPORATION OF SALFORD *v.* LEVER. (1)

1890
March 11.

Practice—Discovery—Interrogatories to Town Clerk of Corporation—Solicitor—Privilege.

In an action by a corporation interrogatories were administered by the defendant for the examination of the town clerk, who objected in his answer to answer certain of the interrogatories, on the ground that the information possessed by the plaintiffs or himself had been obtained by him as the solicitor for the plaintiffs in the action for the purpose of enabling the plaintiffs to bring and maintain the action:—

Held, that, as the corporation had no option to answer by any officer other than the town clerk, but were compelled to answer through him, the privilege was properly claimed by him on their behalf, and the objection was good.

Mayor of Swansea v. *Quirk* (5 C. P. D. 106) distinguished.

APPEAL from chambers.

The defendant having obtained an order allowing him to deliver interrogatories for "the examination of Samuel Brown, town clerk to the above-mentioned plaintiffs," delivered interrogatories, which were answered by Samuel Brown, who, after describing himself as "town clerk of the county borough of Salford, and solicitor to the plaintiffs in the said action," objected to answer certain of the interrogatories, upon the ground that the whole of the information which he or the plaintiffs possessed in regard to the matters inquired into had been obtained by him or under his immediate superintendence and direction in his character as solicitor for the plaintiffs in the action for the express object and purpose of enabling the plaintiffs to bring and maintain the action.

A judge at chambers having ordered a further and better answer on the authority of *Mayor of Swansea* v. *Quirk* (2), the plaintiffs appealed.

Henn Collins, Q.C., and *Montague Lush* (*Charles Gould*, with them), for the plaintiffs. The privilege, which is that of the client and not of the solicitor, was properly claimed, and the order in chambers was wrong. The case is distinguishable from that of *Mayor of Swansea* v. *Quirk* (2), which was decided on

(1) The case was heard before Lord Esher, M.R., and Fry, L.J., sitting as a Divisional Court.

(2) 5 C. P. D. 106.

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the ground that the plaintiffs, having the option of answering through their town clerk, or other proper officer, had elected to answer through their town clerk, and could not therefore set up his individuality as their solicitor in order to avoid giving information which might be known to every member of the corporation. In the present case the interrogatories were not administered to the "proper officer" of the corporation, but were, by an order obtained by the defendant, administered to the town clerk, who was named in the order, and to him alone; the plaintiffs could not therefore elect by whom they should answer, and the town clerk, being also the plaintiffs' solicitor, was entitled to claim on their behalf privilege for information obtained by him for the purposes of the action.

[They also cited *Lyell* v. *Kennedy*. (1)]

Gainsford Bruce, Q.C., and *C. M. Atkinson*, for the defendant. There is no real distinction between the present case and *Mayor of Swansea* v. *Quirk* (2), for there is no substantial difference in the form of the order in the two cases. The town clerk, so far as he represents the corporation, has no individuality at all, and the mere fact that he is also the plaintiffs' solicitor cannot enable him in that character to set up a privilege on their behalf which he could not have set up if he had been merely their town clerk, or had acquired the information in that capacity.

LORD ESHER, M.R. I think that this appeal must be allowed. The defendant is bound to take the town clerk's answer, which is, that as town clerk before the litigation he knew nothing of the matters inquired into; but that since the commencement of litigation he has been acting as solicitor for the plaintiffs, and has obtained this information for the purposes of the action. The privilege is not his, but that of his clients. There is a clear distinction between this case and that of *Mayor of Swansea* v. *Quirk* (2), for in that case the corporation had the option of answering by their town clerk, or other their proper officer, and chose to answer by their town clerk; here the plaintiffs were compelled to answer by their town clerk, and by no one else.

(1) 9 App. Cas. 81. (2) 5 C. P. D. 106.

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FRY, L.J. I am of the same opinion, and as I differ from the learned judge at chambers, I will add my reasons for my judgment. The question is, whether the plaintiffs have disclosed sufficient grounds for the protection claimed. The town clerk, who is required by the order obtained by the defendant to answer these interrogatories, says that all the information in the possession of himself or of the plaintiffs was obtained by himself as solicitor for the plaintiffs in and for the purposes of the action. If a private individual had been interrogated, and had so answered, it would have been a good claim of privilege. Here the person interrogated and obliged to answer is the town clerk, a solicitor who has been prosecuting this action for the plaintiffs; he cannot dissociate himself from his character of solicitor, and privilege is properly claimed on behalf of his clients.

Appeal allowed.

Solicitors for plaintiffs: *Trass & Jarmain, for Samuel Brown, Salford.*

Solicitors for defendant: *Godfrey Rhodes, Firth & Co., for Godfrey Rhodes & Evans, Halifax.*

W. J. B.

[IN THE COURT OF APPEAL.]

May 3.

KNILL *v.* TOWSE.

County Council, Election of—Registration—Elector registered in more than one Division—Right of Voting—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 2, *sub-ss.* (1), (2) (*e*), (4), *and s.* 75—*County Electors Act*, 1888 (51 *Vict. c.* 10), *s.* 7, *sub-ss.* (1), (2), (4), *and* (5)—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 44, *sub-s.* (1), 45, *sub-s.* (5), 51, 59.

In elections of county councillors under the Local Government Act, 1888, an elector, although registered under the County Electors Act, 1888, in more than one electoral division of the same county, is not entitled to vote in more than one electoral division of the same county at the same election.

APPEAL from the judgment of the Queen's Bench Division (Lord Coleridge, C.J., and Mathew, J.), on appeal from the City of London Court. (1)

At an election of county councillors for the administrative county of London, which took place in January, 1889, the

(1) Ante, p. 186.

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defendant was the presiding officer at one of the polling stations in the city of London electoral division of the said county. The plaintiff was duly registered as a county elector for the said county in the registers both of the city of London division and of the Greenwich division. The plaintiff demanded of the defendant a ballot paper to enable him to vote at the election of councillors for the city of London division, at the same time informing him that he had already voted at the election of councillors for the Greenwich division.

The defendant refused to supply the plaintiff with a ballot paper, on the ground that he was not entitled to vote in more than one electoral division of the county. The plaintiff thereupon brought an action in the City of London Court to recover damages for such refusal. The judge held that the defendant's refusal was right, and gave judgment accordingly. The plaintiff appealed against his decision to the Queen's Bench Division, who affirmed the same.

Russell Griffiths, (*Finlay*, Q.C., with him), for the plaintiff.

Henn Collins, Q.C., and *J. V. Austin*, for the defendant.

The arguments and statutes cited were substantially the same as in the Court below.

LORD ESHER, M.R. This action raises the question whether the plaintiff was entitled to vote at the same election for the county council for two candidates in different divisions. It is argued on the one side that, being registered in both the divisions, he is entitled to vote in both; on the other side that, although he is registered in both the divisions, he can only vote at the same election in respect of one; that he may vote in either division in which he is registered, but he cannot vote in both. This question depends entirely on the provisions of the Acts of Parliament regulating elections to the county council. The 2nd section of the Local Government Act, 1888, is the first section which I think we must look at in connection with this question. It is material, I think, in construing this enactment, to observe that the Act is applicable to many boroughs, not only boroughs which were counties of themselves, but others which were not, and which

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for the purposes of this Act are made county boroughs. Sect. 2 relates to the election of county councils, and it is only with such elections that we have now to deal. It is provided by the section that the council of a county and the members thereof shall be constituted and elected, and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough divided into wards, subject, nevertheless, to the provisions of the Act, and in particular to certain other provisions that follow. We have nothing to do, therefore, for the present purpose, with the mode in which parliamentary elections in counties are conducted. Our attention must be directed to the mode of election of the council of a borough divided into wards. Such being the provision of s. 2, we find that by s. 75 of the Act, among other Acts and parts of Acts, the 3rd part of the Municipal Corporations Act, 1882, is incorporated in the Act, so far as the same is unrepealed and is consistent with the provisions of the Act. We have, therefore, to see how, under that Act, elections were conducted in boroughs divided into wards.

By the 45th section, which is in the 3rd part of the Municipal Corporations Act, 1882, it is provided that, where the borough has wards, the burgess roll shall be made in separate rolls, called ward rolls, one for each ward, containing the names of the persons entitled to vote in that ward, and the ward rolls collectively shall constitute the burgess roll. If that section stood alone, a person who had qualifications in several wards would be entitled to be upon the roll as a voter, and to vote, in several wards. It is provided by the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, sub-s. (14), that, where the name of any person appears to be entered more than once as a burgess on the burgess lists for the same municipal borough, the revising barrister shall inquire whether such entries relate to the same person, and, on proof being made to him that such entries relate to the same person, shall retain one of the entries for voting, and place against the other or others a note to the effect that the person is not entitled to vote in respect of the qualification therein contained for the municipal borough, he being on the list for voting in respect of another qualification. When, therefore, it is proved before the barrister that the several entries relate to

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one person, he is to place a note against the entry or entries in respect of which the voter elects not to vote to the effect that he is not entitled to vote in respect of such entry or entries; but still his name will remain on the roll more than once.

Then by s. 51, sub-s. 2, in part 3 of the Municipal Corporations Act, 1882, it is provided that "no person shall subscribe a nomination paper in or for more than one ward, or vote in more than one ward." Therefore, in a borough divided into wards, although a person's name be on more than one of the ward rolls which collectively constitute the burgess roll, he is prohibited from voting in more than one ward. Then it is further provided, in furtherance of the same object, by s. 59, that, at an election of councillors, the presiding officer, if required to do so by two burgesses, or by a candidate or his agent, shall put to any person presenting himself to vote the question whether he has already voted at the election "in this or any other ward."

Such being the mode of election in boroughs divided into wards, how far are these provisions applicable in the case of county councils? The 75th section of the Local Government Act, 1888, incorporates the enactments contained in the 3rd part of the Municipal Corporations Act so far as consistent with the Act, which means that the Act must be read as if those enactments were re-enacted in terms in the Act, so far as they are not inconsistent with any other provisions of the Act. The only question, therefore, seems to be whether there is anything in the Act inconsistent with the provisions to which I have referred. It is argued that s. 51, sub-s. 2, of the Municipal Corporations Act, 1882, is not incorporated, because it is inconsistent with the legislation in the Local Government Act, 1888, with regard to county councils. It is said that it is inconsistent with s. 2, sub-s. 4, of the Local Government Act, 1888, which says that the electors of county councillors are to be the persons registered as county electors under the County Electors Act, 1888, because the latter Act, in s. 7, sub-s. 4, says that nothing in the section shall prevent a county elector from being registered in more than one division register. I cannot see the inconsistency between a provision that a man may be registered in several divisions and a provision that, though he may be registered in several, he may only vote in one at the

same election. The same rules are to apply to elections for the county council as apply to the election of the council in boroughs divided into wards, except so far as such rules may be inconsistent with the Act. I see no inconsistency in holding that, though a person may be registered in several divisions, he can only vote at the same election for one of those divisions. Therefore, I think that the judgment of the Queen's Bench Division was right, and should be affirmed.

FRY, L.J. I am of the same opinion. It appears to me that the ruling principle with regard to the election of county councils is to be found in the 2nd section of the Local Government Act, 1888. That section says that "the council of a county shall be elected in like manner as the council of a borough divided into wards." Therefore, subject to the words that follow, the mode of election of the council in a borough divided into wards is set up as the model for a county council election. Now the town council in such boroughs is elected by persons who can vote in one ward only. Consequently, if in that respect the mode of election of the council in boroughs is taken as the model for elections to the county council, the result is that county electors, having qualifications to vote in several divisions, can vote in one only. Then follow the words, "subject nevertheless to the provisions of this Act and in particular to the following provisions." Then come certain provisions to which I will not at present refer, though I shall have occasion to deal with them later on. At present I wish to refer to the 75th section of the Act. That section incorporates part 3 of the Municipal Corporations Act, 1882, so far as the same is unrepealed and is consistent with the provisions of the Act. When I turn to the 3rd part of the Municipal Corporations Act, 1882, I find two sections which, if applicable, appear to me to be decisive of the present case. The 51st section of the Act provides that "no person shall subscribe a nomination paper in or for more than one ward, or vote in more than one ward." Applying that provision to the case of a county council election, the result plainly is that an elector cannot vote in more than one division. Then by s. 59 of the same Act, when a voter presents himself to vote, he may be asked the question whether

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he has already voted at the election in this or any other ward. It is obvious that the reason for asking this question is that he is not to be allowed to vote in more than one ward. So far all seems plain; but then comes the only remaining question, which is whether there is any provision of the Local Government Act, 1888, which is inconsistent with these provisions of the Municipal Corporations Act, 1882. The only provision that could be relied upon as being inconsistent with them was the 4th sub-section of s. 2. That section says, that "as respects the electors of county councillors, the persons entitled to vote at their election shall be in a borough the burgesses enrolled in pursuance of the Municipal Corporations Act, 1882, and the Acts amending the same, and elsewhere the persons registered as county electors under the County Electors Act, 1888"; which latter Act provides in s. 7, sub-s. 4, that nothing in the section shall prevent a county elector from being registered in more than one division register. There is nothing, however, in the nature of things to make it a necessary consequence of being on the register for more than one division that a person should be entitled to vote more than once at the same election. It was argued that the electoral divisions in a county differed from wards in a borough, and were intended to be like parliamentary electoral divisions in counties, each of which sends its own member to Parliament; but the analogy of parliamentary elections in counties is not applicable, as the election is to be in like manner as in boroughs divided into wards. It does not appear to me that there is anything in the provisions of the Local Government Act, 1888, inconsistent in effect with the application to county council elections of the rule in borough elections by which a person is prohibited from voting in more than one ward. For these reasons I think the appeal should be dismissed.

LOPES, L.J. I am of the same opinion. The 2nd section of the Local Government Act, 1888, seems to me to give the key to the true construction of the enactments on which this question depends. By that section the council of a county is to be elected in like manner as the council of a borough divided into wards. Then by s. 75, part 3 of the Municipal Corporations Act, 1882, is

incorporated. Amongst the sections contained in that part are ss. 51 and 59, the former of which explicitly prohibits an elector from voting for more than one ward. It was argued that that section was inconsistent with the Local Government Act, 1888; because it was inconsistent with the provision that a county elector might be registered in several divisions. I see no inconsistency between the two provisions, and I think that the intention was that the election of county councils should be assimilated in all respects to the election of councils in boroughs, at which a voter is not allowed to vote for more than one ward. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *The City Solicitor.*
Solicitors for defendant: *Lowless & Co.*

E. L.

VESTRY OF ST. JAMES AND ST. JOHN, CLERKENWELL, APPELLANTS, *v.* FEARY, RESPONDENT.

March 26.

Metropolis—Management Acts—Power of Vestry—Order to furnish Water-closet with proper Doors and Coverings—Summons for Neglecting to comply with such Order—Jurisdiction of Magistrate—18 & 19 *Vict. c.* 120, *s.* 81—25 & 26 *Vict. c.* 102, *s.* 64.

By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 81, every house in certain specified districts must be provided with "a water-closet or privy and ashpit furnished with proper doors and coverings," and a penalty is imposed for neglecting to comply with this provision, and power is given to the vestry to give notice in writing to the owner or occupier requiring him "to provide a sufficient water-closet or privy and ashpit so furnished as aforesaid."

By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 64, provision is made for recovery of penalties in case of default in compliance with an order of the vestry.

A vestry gave notice to the respondent requiring him to furnish proper doors and coverings to a water-closet; the respondent did not comply with the order, and did not appeal to the County Council; the vestry then summoned the respondent.

The magistrate held that the order of the vestry was wrongly made, and dismissed the summons:—

Held, on a case stated, that the respondent's proper remedy, if he objected to the order of the vestry, was by appealing to the County Council; and, as he

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had not done so, the only questions for the decision of the magistrate were, whether the order of the vestry had in fact been made, and whether it had been disobeyed; and that if he decided those questions in the affirmative, he was bound to convict.

CASE stated by a metropolitan police magistrate.

A summons was issued by the Vestry of St. James and St. John, Clerkenwell (which is a parish included in Schedule A of the Metropolis Management Act, 1855), under s. 81 of that Act, and s. 64 of the Metropolis Management Amendment Act, 1862, against Mr. Feary, the respondent, which summons, so far as material, was in the words following:—

"Clerkenwell Police Court.

"To Mr. Feary,—

"Owner or occupier of the premises situate and being 5, Buxton Buildings, Clerkenwell.

"Whereas complaint has been made by William John Bartlett, inspector of nuisances, on behalf of the vestry of St. James, Clerkenwell, that you on September 30, 1889, and for every successive day thence next following, in the parish of Clerkenwell, in the county of London, and within the said district, being the owner of a certain house known as 5, Buxton Buildings, in which house there was found, on inspection, to be a water-closet without proper doors and coverings, and which had not been made in accordance with the directions and regulations of the vestry and an Act entitled An Act for the better Local Management of the Metropolis (18 & 19 Vict. c. 120), and that you, being the owner as aforesaid, unlawfully offended in this, that you neglected to provide such proper doors and coverings to the water-closet according to the regulations and notice in writing of the said vestry requiring you to make and provide the same, and according to the provisions of the said Act.

"These are therefore to command you to appear at the police court aforesaid to answer to the said complaint, and to be further dealt with according to law.

"Dated November 1, 1889."

This summons was heard at Clerkenwell Police Court on November 8th, 1889. The facts, as proved by the witnesses for the appellants, were as follows:—

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Mr. Feary, the respondent, was the owner of a house known as No. 5, Buxton Buildings, in the said parish. This house was let out in tenements occupied by different families. The water-closet in the house, which was used in common by all the persons living in the tenement, was a room upwards of five feet square; in one corner of the room was a sink or washing place, and in another corner a copper used for washing; the room was used as a washhouse or scullery by the persons living in the tenement; the seat of the water-closet was not shut off from the rest of the room by any partition or inclosure, and had no door or covering other than the doors and the walls and ceiling of the room. The door of the room opened immediately out of one of the living rooms of the house.

The inspector of nuisances of the parish having inspected the water-closet, reported to the vestry the above-mentioned facts, and that the water-closet was not furnished with a proper door and proper coverings, and it appearing to the vestry from the report and from inquiries into the circumstances of the case that the water-closet was not furnished with a proper door and proper coverings, the vestry gave notice in writing to the respondent as the owner of the house in accordance with the provisions of s. 81 of the Metropolis Management Act, 1855, which was as follows:—

"Parish of St. James and St. John, Clerkenwell.

"Metropolitan Management, Nuisance Removal, and Sanitary Acts.

Sanitary Department, Vestry Hall, Rosoman Street, E.C.

"September 21, 1889.

"To Mr. Feary, Gloucester House, North Road, Highgate, owner of the premises situate and being 5, Buxton Buildings.

"Take notice that you are hereby ordered and required by the vestry of the parish to provide a fit and proper door and an efficient inclosure to water-closet within seven days from the date hereof to the satisfaction of the vestry."

Signed by the officer appointed by the vestry to take proceedings under the Acts.

The respondent did not comply with the order of the vestry, and the vestry issued the summons for the recovery of a penalty

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from the respondent under s. 64 of the Metropolis Management Amendment Act, 1862.

On the hearing of the summons it was contended by the appellant that the vestry had power and jurisdiction to order the respondent to provide a door and proper coverings for the water-closet in addition to the doors and walls and ceiling of the room, and to make the order and requisition mentioned in the notice, and that the magistrate could not overrule the decision of the vestry, that the water-closet was not furnished with a proper door and proper coverings, and that under the circumstances the water-closet was not furnished with proper doors and coverings within the meaning of s. 81 of the Metropolis Management Act, 1855, and that, the respondent not having complied with the order of the vestry, the vestry was entitled to recover a penalty from the respondent under s. 64 of the Metropolis Management Amendment Act, 1862. It was contended by the respondent that the door of the room constituted the door of the water-closet, and that it was not the less a water-closet because it contained a sink and a copper.

The magistrate was of opinion that the water-closet was provided with a proper door and covering within the meaning of s. 81 of the Metropolis Management Act, 1855, and that the vestry had no jurisdiction to order the respondent to provide any further door or covering for the water-closet, and that the magistrate was not bound by the decision of the vestry that the water-closet was not furnished with proper doors and coverings. He therefore gave judgment for the respondent, but on the application of the appellants stated this case for the opinion of the Court.

The questions for the opinion of the Court were:—

(1.) Whether, under the circumstances, the vestry had power and jurisdiction to order the respondent to provide a further door and coverings for the water-closet, and to make the order and requisition mentioned in the notice.

(2.) Whether the magistrate was bound by the decision of the vestry that the water-closet was not furnished with a proper door and proper coverings.

(3.) Whether, under the circumstances, the water-closet was furnished with a proper door and proper coverings within the meaning of s. 81 of the Metropolis Management Act, 1855 (1).

Spokes, for the appellants. By 18 & 19 Vict. c. 120, s. 211, an appeal was given from the order of the vestry to the Metropolitan Board of Works, the jurisdiction of which is now, by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40, sub-s. 8, transferred to the London County Council. The respondent's

(1) By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 81, ". . . it shall not be lawful newly to erect any house, or to rebuild any house pulled down to the extent aforesaid, within any parish mentioned in Schedule (A.) to this Act, or any district mentioned in Schedule (B) to this Act, without a sufficient water-closet or privy and ashpit furnished with proper doors and coverings" . . . (and a penalty is imposed); "and if at any time it appear to the vestry or district board of such parish or district that any house in any such parish or district . . . is without a sufficient water-closet or privy and ashpit furnished with proper doors and coverings . . . the vestry or district board shall, in case the same can be provided without disturbing any building, give notice in writing to the owner or occupier of such house, requiring him forthwith, or within such reasonable time as shall be specified in such notice, to provide a sufficient water-closet or privy and ashpit so furnished as aforesaid, or either of them, as the case may require" (and in case of default power is given to the vestry or district board to do the work and recover the expenses incurred).

The parish of Saint James and Saint John, Clerkenwell, is included in Schedule (A) to the Act.

By s. 211: "Any person who deems himself aggrieved . . . by any order or act of any vestry or district board in relation to the construction, repair, alteration . . . of any . . . water-closet, privy, ashpit, . . . may within seven days after notice of any such order, . . . or after such act, appeal to the Metropolitan Board of Works against the same."

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40, sub-s. 8, the powers and duties of the Metropolitan Board of Works are transferred to the London County Council.

By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 64, after reciting s. 81 of the Metropolis Management Act, 1855, it is enacted: "That in case of any such neglect or default by any person or persons to comply with the order of any vestry or district board to execute any works, matters, or things under any of the said provisions, the person or persons so offending shall forfeit and pay to the vestry or district board a sum not exceeding five pounds, and also a further sum not exceeding forty shillings for every day during which such offence shall continue, to be recovered by action at law or before a justice of the peace in a summary manner, at the option of the vestry or district board."

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remedy, therefore, was by appealing against the order of the vestry, and, as he did not appeal, the only questions for the decision of the magistrate were whether the vestry had in fact made the order, and whether the respondent had disobeyed it. He had no jurisdiction to decide against the validity of the order.

[He referred to *Tinkler* v. *Wandsworth District Board of Works* (1); *Vestry of St. Luke's* v. *Lewis* (2); *Hargreaves* v. *Taylor*. (3)]

Poley, for the respondent. The magistrate's decision was right. The vestry were bound to hear the respondent before making the order, and the order was wrong, for the words, "furnished with proper doors and coverings," in 18 & 19 Vict. c. 120, s. 81, refer only to the words "privy and ashpit," and not to the word "water-closet."

[He referred to *Cooper* v. *Wandsworth District Board of Works*. (4)]

LORD COLERIDGE, C.J. I am of opinion that the questions raised by this case must be answered adversely to the view adopted by the magistrate. The first question is, whether the vestry had jurisdiction to order the respondent to provide a further door and coverings for the water-closet. I am of opinion that they had. The second question is, whether the magistrate was bound by the decision of the vestry, that the water-closet was not furnished with a proper door and proper coverings. I am of opinion that he was. The question turns almost exclusively on 25 & 26 Vict. c. 102, s. 64, which—after reciting that, by certain sections of 18 & 19 Vict. c. 120, certain works are required to be executed, and in case of refusal or neglect the vestry are authorized to execute such works—enacts "that in case of any such neglect or default by any person . . . to comply with the order of any vestry . . . to execute any works . . . under any of the said provisions, the person . . . so offending shall forfeit and pay to the vestry . . . a sum" specified, and a further sum for every day during which the offence continues. The question is whether, in dealing with an order of the vestry to execute works, anything

(1) 2 De G. & J. 261; 27 L. J. (Ch.) 342.

(2) 1 B. & S. 865; 31 L. J. (M.C.) 73.

(3) 3 B. & S. 613; 32 L. J. (M.C.) 111.

(4) 14 C. B. (N.S.) 180; 32 L. J (C.P.) 185.

is open to the magistrate except to inquire whether the order was made, and whether it was disobeyed. It might be a serious question whether the order had in fact been complied with, and I agree that the magistrate is not bound to accept the mere assertion of the vestry as to this question. He must decide the question himself, and he may decide it either way. I agree with what has been suggested by the Master of the Rolls, that it is putting it too strongly to say that the magistrate's duty is merely ministerial. On the contrary, he has an important judicial function to discharge. In the present case it is admitted that the order of the vestry was not complied with; but the magistrate held that the making of the order was outside the jurisdiction of the vestry under the circumstances of the case; but in so holding he was going beyond his own jurisdiction. There is an appeal to the County Council, and that is the remedy which the respondent ought to have adopted. It is contended that there must be some opportunity of questioning the propriety of the order made by the vestry, and I agree that the case of *Cooper* v. *Wandsworth District Board of Works* (1) is an authority for that proposition. Such an opportunity may be given in one of two ways—in the first place, before the vestry do anything they may give notice to the person whom they require to execute the works, and he may object; or, secondly, they may make the order, and if they do that they must give the person affected notice of such order. It is enough if an opportunity is given of questioning the propriety of the order, and in the present case such an opportunity was given, for the notice to execute the works was given on September 21, but no summons was taken out until November 1. Therefore, the respondent had abundant opportunity of calling in question the propriety of the order of the vestry, but he did nothing. Then, is there anything in the case of *Cooper* v. *Wandsworth District Board of Works* (1) which shews that what was done in the present case was wrong? That case was decided as it was on the ground that the principles of justice had been violated. In that case the plaintiff's house was pulled down without any notice or any opportunity of being heard having been given to him, the board thinking that, because he had given no notice to

(1) 14 C. B. (N.S.) 180; 32 L. J. (C.P.) 185.

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them of his intention to build, they were free to act as they thought fit, and need give no notice of their intention to pull down the house; but the Court of Common Pleas decided that, because the plaintiff had had no opportunity of being heard, the defendants were guilty of a trespass, for which the plaintiff was entitled to recover. That is the ground which the judges took in coming to the conclusion at which they arrived. The point is especially clearly put by Byles, J., who said: "This is a case in which the Wandsworth District Board have taken upon themselves to pull down a house, and to saddle the owner with the expenses of demolition, without notice of any sort. There are two sorts of notice which may possibly be required, and neither of them has been given—one, a notice of a hearing, that the party may be heard if he has anything to say against the demolition; the other is a notice of the order, that he may consider whether he can mitigate the wrath of the board, or in any way modify the execution of the order. Here they have given him neither opportunity. It seems to me that the board were wrong, whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions . . . establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. . . . There has been neither notice of the one sort nor of the other; and it seems to me, therefore, that, whether the board acted judicially or ministerially, they have acted against the whole current of authorities, and have omitted to do that which justice requires, and contravened the words of the statute." (1) Keating, J., said in the same case: "I think it is impossible to read the 76th section of the statute without seeing that the district board of works are to exercise a discretion of a very important character indeed; because they are authorized, where there has been no notice, or where their order has been contravened in any way, to demolish or to alter, as the case may require. Therefore, they are to form a judgment as to how far and to what extent demolition or alteration are required. That being so,

(1) 14 C. B. (N.S.) at pp. 194, 195.

surely it must be intended that they are, by means of hearing the party against whom their order is to be made, to ascertain the facts so as to be able to form a judgment upon the matter in question." (1) This is the only case which bears on the matter now before us. In *Tinkler* v. *Wandsworth District Board of Works* (2) the Court interfered because the board had given a general order, and had acted in an individual case as if they had given attention to that particular case.

For the reasons which I have given I have come to the conclusion that this case must be remitted to the magistrate.

LORD ESHER, M.R. (3) This case arises on a summons taken out by the vestry under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 81, and the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 64. The question arose whether the magistrate could decide that the vestry had no jurisdiction to make the order which they had made; and he held that he could so decide, on two grounds—first, that the vestry could not make such an order, and, secondly, that they had not heard the respondent judicially. It is not necessary to decide whether the magistrate had power to decide as to whether the vestry had jurisdiction or not. It is contended, first, that the magistrate's decision was right on the construction of the statute (18 & 19 Vict. c. 120, s. 81); but that section must be read grammatically, and if it is read grammatically it is apparent that the words "furnished with proper doors and coverings" apply to the word "water-closet" as well as to the words "privy and ashpit"; therefore, in putting the interpretation which he did on that section, the magistrate decided wrongly. Then it is contended that the vestry is a judicial body, and that they were bound to hear the respondent in a judicial manner; but there are no words in the statute which entitle us to hold that the vestry is to act as a Court. They may give notice of a hearing, that the party may be heard, as Byles, J., pointed out in *Cooper* v. *Wandsworth District Board of Works* (4); but he goes on to say there is another way

(1) 14 C. B. (N.S.) at p. 196.

(2) 2 De G. & J. 261; 27 L. J. (Ch.) 342.

(3) The Lord Chief Justice and the Master of the Rolls were sitting as a Divisional Court of the High Court of Justice.

(4) 14 C. B. (N.S.) at p. 194.

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in which they can proceed, namely, by giving notice of the order. The vestry must give notice of the order because there is a right of appeal within seven days. The party affected by the order can object to it, or he has a right to appeal to the County Council. If the magistrate decided this case on the ground that the vestry were bound to hear the respondent judicially, I am of opinion that his decision was wrong. In the present case notice was given, and the respondent had the choice of two remedies; but he took neither, but disobeyed the order. I am of opinion that on the true construction of 25 & 26 Vict. c. 102, s. 64, if the magistrate comes to the conclusion that the order has been made, and has not been obeyed, he is bound to convict.

Case remitted.

Solicitors for appellants: *Boulton, Sons & Sandeman.*
Solicitors for respondent: *Lewis & Sons.*

P. B. H.

April 22.

[IN THE COURT OF APPEAL.]

HOPKINS AND ANOTHER *v.* SMETHWICK LOCAL BOARD OF HEALTH.

Local Government—Buildings—Contravention of Bye-law—Notice of Intention to pull down—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 158.

Where a building has been erected in contravention of the bye-laws of a local board of health, the board cannot, under s. 158 of the Public Health Act, 1875, pull down the building without giving the owner an opportunity of shewing cause why it should not be pulled down.

Cooper v. *Wandsworth District Board of Works* (14 C. B. (N.S.) 180); and *Masters* v. *Pontypool Local Government Board* (9 Ch. D. 677) approved.

APPEAL from the judgment of the Queen's Bench Division setting aside a verdict and judgment for the defendants, and directing the entry of judgment for the plaintiffs.

The action was brought for an alleged wrongful act of the defendants in entering and pulling down a house of the plaintiffs. The defendants justified under the Public Health Act, 1875, and their own bye-laws.

It appeared that the plaintiffs, being desirous of building on

certain land, deposited plans with the defendants. These plans were considered and rejected and notice thereof given to the plaintiffs. Amended plans were deposited a second and third time, but these also were rejected. The plaintiffs then brought materials on to the land, broke up the footpath of the road, and commenced to build. Notice was given to them on behalf of the board to remove the buildings, and subsequently two summonses were taken out against the plaintiffs, who were fined for contravention of the bye-laws. As they still continued to build the defendants instructed their surveyor to enter on the land and pull down the buildings, which was done. No notice of the intention of the defendants to do this was given to the plaintiffs. At the trial the learned judge was of opinion that the defendants were justified under the Public Health Act, 1875, and their bye-laws, in pulling down the buildings, and he directed a verdict for the defendants, for whom judgment was entered. The damages, in case the plaintiffs were entitled to any, were agreed.

The plaintiffs moved in the Queen's Bench Division to set aside the verdict and judgment and enter a judgment for the plaintiffs.

1890. Jan. 31. *Jelf, Q.C.*, and *Vachell*, in support of the motion. The act of the defendants in deciding that the buildings should be pulled down was judicial, and the plaintiffs should have had an opportunity of shewing cause why it should not be carried out: *Cooper* v. *Wandsworth District Board of Works* (1); *Masters* v. *Pontypool Local Government Board.* (2)

Alfred Young and *Shakespeare*, for the defendants. The plaintiffs were not entitled to any further notice than they received. They had been acting illegally throughout, and must take the consequence of so acting. The cases cited for the plaintiffs are distinguishable on that ground. [They cited *Baker* v. *Mayor of Portsmouth* (3), and *Robinson* v. *Barton-Eccles Local Board.* (4)]

DENMAN, J. This is an action for demolishing buildings in progress, the defence being that, in accordance with the

(1) 14 C. B. (N.S.) 180.
(2) 9 Ch. D. 677.
(3) 3 Ex. D. 4, 157.
(4) 8 App. Cas. 798.

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Denman, J.

Public Health Act, 1875, and their own bye-laws, the defendants had a right to act as they did. It is not necessary to go much in detail into the statute or bye-laws. Putting the case most favourably for the defendants, they say that their disapproval had been intimated, and assuming this and that that disapproval was in accordance with the mind of the board, we are bound to hold upon the decided cases that the plaintiff had a good cause of action. *Cooper* v. *Wandsworth District Board of Works* (1), which was cited at the trial, seems to have been decided upon two grounds, either of which is sufficient to support the plaintiff's right. There the Court said that even if the order was a proper order on the face of it, and was unimpeachable, yet where it was of so strong a nature as to command a man to pull down his building, or as to authorize the servants of the board to do it, then, before the building was demolished the man ought to have an opportunity of shewing cause. It is clear here that the board never did anything of the kind; there was a good deal of correspondence with the surveyor, and a resolution of the board to pull down the buildings in forty-eight hours unless the plaintiffs did so; but they gave no intimation of the time when and place at which the plaintiffs might appear for the purpose of shewing cause against the order. The case is thus brought within the principle of *Cooper* v. *Wandsworth District Board of Works.* (1) That case was approved (though for the purposes of to-day it is not necessary that it should have been) in a well-considered judgment of Fry, J., in *Masters* v. *Pontypool Local Government Board.* (2) The cases cited on the other side are not in point. I cannot distinguish this case in principle from *Cooper* v. *Wandsworth District Board of Works* (1), and there must be judgment for the plaintiffs.

WILLS, J. I am of the same opinion. The only material question is, whether the principle of *Cooper* v. *Wandsworth District Board of Works* (1) applies to the Public Health Act, 1875, as well as to the Metropolis Management Act; if so, the principle there laid down has not been satisfied. In condemning a man to have his house pulled down, a judicial act is as much implied

(1) 14 C. B. (N.S.) 180. (2) 9 Ch. D. 677.

as in fining him 5*l.*; and as the local board is the only tribunal that can make such an order its act must be a judicial act, and the party to be affected should have a notice given him; and there is no notice, unless notice is given of time when, and place at which the party may appear and shew cause. It is true that there are differences of phraseology in the two Acts, and the phraseology of the later Act is not so strong as that of the Metropolis Management Act; but the judgment of Willes, J., goes far more upon the nature of the thing done by the board than on the phraseology of the Act itself. It deals with the case on principle; from the nature of the thing done it must be a judicial act, and justice requires that the man should be heard. It is true that he strengthens his judgment by a reference to the language of the Metropolis Management Act; but the absence from the Public Health Act of the words to which he refers can make no difference. The language of an Act of Parliament may, it is true, be so strong as to shew that the act is not a judicial act: *Cheetham* v. *Manchester Corporation* (1) is an authority to that effect; there the act might be done without notice, presentment, or any other formality, and it was held that the presumption of its being a judicial act was set aside, and that the decision in *Cooper* v. *Wandsworth District Board of Works* (2) was inapplicable. But in the present case there is nothing in the Act of Parliament to limit the natural inference as to the nature of the act.

The case is not destitute of authority on this very point; in *Masters* v. *Pontypool Local Government Board* (3) it is clear that Fry, J., thought the principle of *Cooper* v. *Wandsworth District Board of Works* (2) applied, though there are other grounds upon which he decided the case. It is clear that he thought that the decision in the former case did not depend upon the phraseology of the Act, but upon the broad principle to which we have alluded. The counsel for the defendants has tried to make out before us that the plaintiffs had notice, because they knew where the board met; but it is clear that they had no notice in any proper sense of the term. Such a power as that of pulling down a man's house

(1) Law Rep. 10 C. P. 249. (2) 14 C. B. (N.S.) 180.
(3) 9 Ch. D. 677.

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should be exercised in a reasonable way, and I agree that this appeal must be allowed.

Judgment for the plaintiffs.

W. J. B.

The defendants appealed.

1890. April 22. *Alfred Young* and *Shakespeare*, in support of the appeal. The Divisional Court acted on the authority of *Cooper* v. *Wandsworth District Board of Works* (1), which decided that a board has no right to pull down a building without hearing the owner, but that case was decided before the Public Health Act, 1875, under a local Act which gave seven days for appeal against an order for demolition of buildings. The Public Health Act, 1875, and the bye-laws contain no such provision. In *Masters* v. *Pontypool Local Government Board* (2), the defendants had approved of plans and the plaintiff had proceeded with the building. Subsequently the defendants altered their minds and pulled down the building without notice. The present case is very different. No plans which the board could approve have been submitted, yet the plaintiffs went on in defiance and contravention of the bye-laws, even after they had received notice to remove the buildings and been fined for not doing so. They had under these circumstances no right to any special notice of the intention of the board to pull down the buildings.

Jelf, Q.C., and *Vachell*, contrà, were not called on.

LORD ESHER, M.R. The power which the local board exercised to enter on the property of the plaintiffs and pull down the buildings they had erected is a highly penal one. Those who exercise such a power are bound to act strictly within it. The two cases *Cooper* v. *Wandsworth District Board of Works* (1), and *Masters* v. *Pontypool Local Government Board* (2), shew that where there is power to enter and pull down buildings which have been erected in contravention of bye-laws, it would be contrary to fundamental justice to allow that course to be taken without giving the owner notice and an opportunity to shew cause. We have not been asked to overrule those decisions, and we agree with the principles

(1) 14 C. B. (N.S.) 180. (2) 9 Ch. D. 677.

laid down in them. The action, therefore, of the defendants was contrary to law, and was a trespass for which the plaintiffs were entitled to damages. The appeal must therefore be dismissed.

FRY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Pattison, Wigg & Co., for H. Grosvenor Hill, Birmingham.*

Solicitors for defendants: *C. Robinson & Co., for W. Shakespeare, Birmingham.*

A. M.

MEADOWS *v.* TAYLOR.

April 17.

Local Government—New Building—Addition to existing Building—Hastings Improvement Act, 1885 (48 & 49 *Vict. c. cxcvi.*), *s.* 111.

By s. 111 of the Hastings Improvement Act, 1885, "the making of any addition to an existing building by raising any part thereof . . . . shall for all the purposes of this Act and of any other local Act for the time being in force within the borough and of the Public Health Acts, and of any bye-law made thereunder respectively, be deemed to be the erection of a 'new building,' and the word 'building' shall, for all such purposes, include an erection or building of a permanent character of whatever material constructed." By bye-law 81 of the bye-laws duly made under the Public Health Act, 1875, "every person who shall intend to erect a building or otherwise to execute any work to which any of the bye-laws relating to new buildings may apply, shall, before beginning to erect such building or to execute such work, deliver or send, or cause to be delivered or sent, to the surveyor of the sanitary authority notice in writing, in which shall be specified the date on which such person will begin to erect such building or to execute such work;" and by bye-law 87 a penalty is imposed for offences against the bye-laws.

The respondent, a builder, had built a house with a conservatory on the first floor, in accordance with plans duly passed by the sanitary authority. Subsequently the respondent pulled down the conservatory, and in its place built a bedroom, a portion of one of the external walls of the house being raised for that purpose; the bedroom was of the same height as, and occupied no greater space than, the conservatory for which it was substituted. No notice under bye-law 81 was sent by the respondent to the surveyor before the erection of the bedroom. Upon a summons charging the respondent with not giving such notice before beginning to erect a building to which the bye-laws relating to new buildings applied, the justices held, that as the bedroom when erected did not occupy any greater space than was previously occupied by the conservatory, the respondent had not by the erection of the bedroom made an addition to an

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existing building within the meaning of s. 111 of the Hastings Improvement Act, 1885, and dismissed the summons:—

Held, that the justices were wrong, and that the mere fact that the bedroom occupied no greater space than the erection for which it was substituted did not necessarily prevent its being an addition to an existing building within the meaning of the section.

CASE stated by justices under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49, s. 33, from which the following facts appeared.

An information was laid by the appellant, as town clerk of the borough of Hastings, against the respondent, a builder, charging that the respondent, "being a person intending to erect a building to which the bye-laws of the Hastings Urban Sanitary Authority relating to new streets and buildings applied, to wit, the making of an addition to an existing building or dwelling-house by raising a certain part thereof, did not, before beginning to erect such building, deliver to the surveyor notice in writing specifying the date on which he would begin to erect such building by making such addition as aforesaid."

By s. 111 of the Hastings Improvement Act, 1885 (48 & 49 Vict. c. cxcvi.), it is enacted that "the making of any addition to an existing building by raising any part thereof or making any projection therefrom, but so far as regards such addition only, shall for all the purposes of this Act and of any other local Act for the time being in force within the borough, and of the Public Health Acts and of any bye-law made thereunder respectively, be deemed to be the erection of a 'new building,' and the word 'building' shall for all such purposes include an erection or building of a permanent character of whatever material constructed."

By the 81st bye-law of the Hastings Urban Sanitary Authority, made under the Public Health Act, 1875, "Every person who shall intend to erect a building or otherwise to execute any work to which any of the bye-laws relating to new buildings may apply, shall, before beginning to erect such building or to execute such work, deliver or send, or cause to be delivered or sent, to the surveyor of the sanitary authority, at his or their office, notice in writing, in which shall be specified the date on which such person will begin to erect such building or to execute such work." By bye-law 87 a penalty is imposed on offences against the bye-laws.

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Upon the hearing of the summons it was proved that in May, 1888, the respondent deposited with the urban sanitary authority a plan of the house in question, which plan was duly passed and the house erected in accordance with it. At the back of the house, on the first floor, and immediately over that portion indicated on the plan by the words "scullery, coals, and larder," was a conservatory, three walls and the roof of which consisted of a framework of wood filled in with glass, and access to which was gained through a French window or door in the wall of the first-floor room to which the conservatory was adjacent; this wall was one of the external walls of the dwelling-house, unless the erection of the conservatory prevented it from being an external wall.

In September, 1889, the respondent pulled down and removed the conservatory, bricked up the French window or door, and raised the external wall of that portion of the house indicated upon the plan by the words "scullery, coals, and larder" to the height at which the roof of the conservatory was previously situate, and thereby erected over the scullery, in the place previously occupied by the conservatory, a bedroom or boxroom, to which access was gained as described in the case. The three external walls of this bedroom were of the same height as the corresponding walls of the conservatory, but were constructed of brick and mortar, and the bedroom was roofed over with a roof of timber and slates, occupying the same position as the roof of the conservatory. No notice was given to the surveyor before the erection of this bedroom, specifying the date on which the respondent would begin to erect it.

It was contended on behalf of the appellant, that by the erection of the bedroom the respondent had made an addition to an existing building by raising a part thereof, and making a projection therefrom within the meaning of s. 111 of the Hastings Improvement Act, 1885, and was therefore for the purposes of that Act and of the Public Health Act, 1875, and of any bye-law made thereunder, to be deemed to have erected a new building, and that by omitting to give the notice prescribed by the 81st bye-law he had offended against such bye-law, and was liable to the penalties prescribed by the 87th bye-law.

It was contended for the respondent that he had not made an

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addition to an existing building within the meaning of s. 111 of the Hastings Improvement Act, 1885, and that it was therefore unnecessary for him to give the notice prescribed by the 81st bye-law before commencing the erection.

The justices held, that inasmuch as the bedroom when erected did not occupy any greater space than was previously to its erection occupied by the conservatory, the respondent had not by the erection of the bedroom made an addition to an existing building within the meaning of s. 111 of the Hastings Improvement Act, 1885, and therefore dismissed the summons.

The question for the opinion of the Court was whether the justices were right in so holding.

R. Cunningham Glen (*Lumley Smith, Q.C.*, with him), for the appellant. The justices have found that the respondent has not made an addition to an existing building within the meaning of s. 111, because the substituted bedroom occupies no greater space than was originally occupied by the conservatory, and this is a question of law upon which their decision may be properly reviewed by this Court, and is not a mere finding of fact: *Hobbs* v. *Dance*. (1) It is clearly found in the case that the external wall had been raised by the respondent, and this raising would, or at any rate might, be an addition to an existing building within the meaning of the section, and the mere fact that there was no increase in the cubical space occupied is not in law a good and sufficient reason for preventing the application of the section. [He also cited *Shiel* v. *Mayor of Sunderland* (2); *Scott* v. *Legg*. (3)]

H. C. Richards (*De Sausmarez*, with him), for the respondent. The finding of the justices is a finding of fact, and it is not the less a finding of fact because they have given their reasons; no appeal from their decision will therefore lie: *James* v. *Wyvill*. (4) Even if their reason is wrong, they may still properly find that what the defendant did was not an addition to an existing building within s. 111.

HUDDLESTON, B. I think that this case must be sent back to the magistrates. They have taken upon themselves to state the

(1) Law Rep. 9 C. P. 30.
(2) 6 H. & N. 796.
(3) 10 Q. B. D. 236.
(4) 51 L. T. (N.S.) 237.

reason for their finding, with the obvious intention of asking us to say whether that reason was correct. I take it that the ground of their decision was, that if the new building occupied no more space than the old one, the case was not within s. 111. No doubt it was correctly said on behalf of the respondent that the decision of magistrates on a question of fact is final, and if they had jurisdiction over the inquiry it would be conclusive; and therefore, if the magistrates had merely said that they found that what had been done was not an addition within the meaning of s. 111, we should be bound to accept their decision. But they have not done so; they have given their reasons and invited our opinion upon them, and we must therefore consider whether their decision proceeded upon a right ground.

The summons was issued under the Hastings Improvement Act, 1885, against a builder, for having erected something which was said to be within s. 111 of that Act; in other words, he was charged with not having given proper notice to the local authority before commencing to make an addition to an existing building. The object of such a provision, when contained in a local improvement Act or in bye-laws, is the sensible one of enabling the surveyor to determine whether the plans should be passed as being within the bye-laws or not. Now, what was done here? A house was to be built with a conservatory attached on the first floor; a notice was given and plans deposited shewing the nature of the work; there was no contravention of any bye-law; permission was given for the erection; and the house was in due course built, together with the conservatory. Shortly afterwards the respondent pulled down the conservatory and removed the materials, raised the external wall to the height of the conservatory roof, and made a bedroom in the place previously occupied by the conservatory, which room did not occupy any greater space than the conservatory had done.

It is argued on behalf of the appellants that this was a new building within the meaning of s. 111 of the Improvement Act, notice of which should have been given to the surveyor; and when that section is looked at, the argument is that notice was necessary, because what was done amounted to the making of an addition to an existing building by raising a part thereof. Now

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in this case it is found that part of the wall was raised, and therefore the case seems to be within the strict language of the section. It is clear that if alterations of every description which only covered the same space as the former erection were to be held to be unaffected by the provisions of s. 111, great inconveniences might arise; a builder might send in a plan of a building to which no objection could be taken, and get the plan passed, and when he had erected the building in accordance with the plan, might replace it by another building in every respect objectionable, provided it occupied no more space than the first one; for instance, he might obtain the necessary sanction for the plans of a verandah extending along the whole front of a building for four or five feet from the wall, and having built it might pull it down after erection and erect another building in the same space of a wholly insufficient character. No one could doubt that this would be a clear evasion of the Act. Therefore, as the justices have found that there was a raising of a portion of the wall, they have found that something was done which might make the building a new building, and might require notice of its intended erection to be given. In my opinion, therefore, the decision of the magistrates in this case on the point of law stated for our opinion was erroneous. It is suggested, however, that notwithstanding our decision upon this point, the magistrates might properly come to the conclusion that this was not a new building. The case must therefore go back to them, with an intimation of our opinion that their view, that there was no case within s. 111 because the new buildings only occupied the same space as the old ones, was a wrong view, and that they should inquire whether what was done was such an addition to the original house as would require notice of its intended erection to be given.

GRANTHAM, J., concurred.

Case remitted to justices.

Solicitor for appellant: *J. H. Lydall, for Meadows, Elliott & Meadows, Hastings.*

Solicitor for respondent: *John Hands, for Smith & Atkinson, Hastings.*

W. J. B.

[IN THE COURT OF APPEAL.]

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April 18.

IN RE URQUHART. EX PARTE URQUHART.

Bankruptcy—Service of Bankruptcy Notice or Petition—Substituted Service—Debtor out of Jurisdiction—Bankruptcy Rules, 1886, *rr.* 141, 153, 154, 156.

Under rule 154 of the Bankruptcy Rules, 1886, an order for substituted service of a bankruptcy notice or petition may be made, notwithstanding that the debtor is out of the jurisdiction, if the Court is satisfied by the evidence that he went out of the jurisdiction in order to avoid service.

Fry v. *Moore* (23 Q. B. D. 395) explained and distinguished.

APPEAL against the refusal of the registrar to rescind a receiving order.

The debtor was a domiciled Scotchman; but he had carried on business in the city of London, and had resided at an hotel in Dover Street, Piccadilly. On November 20, 1889, the petitioning creditors recovered judgment against him in the Queen's Bench Division for 135*l.* 9*s.* 2*d.*, and on January 8, 1890, they issued a bankruptcy notice against him in respect of the judgment debt. They were unable to effect personal service of the notice, the debtor having gone away to Scotland on December 27, 1889. On January 17, 1890, the registrar, upon evidence which satisfied him that the debtor was keeping out of the way to avoid service, made an order for substituted service of the bankruptcy notice, and substituted service was effected under this order. The bankruptcy notice was not complied with, and on January 27 the bankruptcy petition was presented against the debtor, founded on his non-compliance with the notice. A similar order was made for substituted service of the petition, and service was effected in the same way. The debtor did not appear at the time appointed for the hearing of the petition, and the registrar on February 13 made a receiving order against him. He afterwards, by the leave of the Court, gave notice of motion to rescind the receiving order, on the ground that the bankruptcy notice and petition did not come to his knowledge until after the receiving order was made, and that the orders for substituted

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service were improperly obtained. The registrar refused to rescind the receiving order.

The debtor appealed.

Firminger, for the debtor. Both the orders for substituted service were irregularly made, and the receiving order which is founded upon them is invalid and ought to be rescinded. The debtor being out of the jurisdiction, rule 154 (1) of the Bankruptcy Rules, 1886, which provides for substituted service, did not apply. That rule applies only to a case in which a debtor is evading service within the jurisdiction—when personal service could be effected if it was known where he was. If the debtor has gone out of the jurisdiction to avoid service, rule 156 applies.

Under the Rules of the Supreme Court, 1883, it has been held that, when the defendant to an action is out of the jurisdiction, an order cannot be made for substituted service of the writ within the jurisdiction: *Fry* v. *Moore*. (2) The same principle applies to the Bankruptcy Rules. If rule 154 was intended to apply to every case in which a debtor is avoiding service, rule 156 would have been unnecessary.

Wace, for the petitioning creditors, was not heard.

(1) Rule 141: "A bankruptcy notice shall be served, and service thereof shall be proved, in the like manner as is by these rules prescribed, for the service of a creditor's petition."

Rule 153: "A creditor's petition shall be personally served by delivering to the debtor a sealed copy of the filed petition."

Rule 154: "A petition shall be served upon the debtor by an officer or bailiff of the Court, or by the creditor, or his solicitor, or by some person in their employ; provided that, if personal service cannot be effected, the Court may extend the time for hearing the petition, or if the Court is satisfied by affidavit or other evidence on oath that the debtor is keeping out of the way to avoid such service, or service of any other legal process, or that for any other cause prompt personal service cannot be effected, it may order substituted service to be made by delivery of the petition to some adult inmate at his usual or last known residence or place of business, or by registered letter, or in such other manner as the Court may direct, and that such petition shall then be deemed to have been duly served on the debtor."

Rule 156: "Where a debtor petitioned against is not in England, the Court may order service to be made within such time and in such manner and form as it shall think fit."

(2) 23 Q. B. D. 395.

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LORD ESHER, M.R. The debtor applied to rescind the receiving order, on the ground that neither the bankruptcy notice nor the petition was legally served upon him. The registrar has held that both were duly served by means of the orders for substituted service. Neither of those orders was appealed from; but on the present appeal they are both indirectly appealed from. It is said that the registrar had no jurisdiction to make an order for substituted service of the bankruptcy notice, because at the time when the order was made the debtor was not in England. It is said that an order cannot be made for substituted service unless the debtor is within the jurisdiction; so that, if the creditor had known where he was, he could have been personally served with the notice. Is there any such restriction in rule 154? It says that the Court may order substituted service to be made, if it is satisfied by evidence "that the debtor is keeping out of the way to avoid such service." There is nothing in those words to shew that an order for substituted service cannot be made if the debtor is keeping out of the way out of the jurisdiction. There is nothing to confine the words to a debtor who is keeping out of the way within the jurisdiction. The words are quite general, and, in my opinion, if the Court is satisfied that the debtor has gone out of the jurisdiction to avoid service, an order for substituted service can be made. An order for service out of the jurisdiction cannot be made except under peculiar circumstances.

In the present case the utmost that can be said on behalf of the appellant is, that the affidavits are contradictory, and the registrar has believed those affidavits which said that the debtor had gone away to Scotland to avoid service. The debtor has not made any affidavit himself. In my opinion there was ample evidence to justify the registrar in coming to the conclusion that the debtor went away to Scotland to avoid service. There is nothing to confine the rule to the case of a debtor who is evading service in England, and I think it was intended to meet the case of a debtor who has gone out of England to avoid service. In my opinion, therefore, the orders for substituted service were rightly made.

Fry v. *Moore* (1) has no real application to the present case.

(1) 23 Q. B. D. 395.

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In that case, at the time when the writ was issued, the defendant was in Canada, and the leave of the Court ought to have been obtained for the issue of the writ. The irregularity consisted in issuing the writ without leave, and it was said that the obtaining of an order for substituted service was a method of evading the provisions of the rules as to the service of a writ out of the jurisdiction. And even in that case it was held that there had been only an irregularity which was capable of being waived, and that it had been waived by the conduct of the defendant.

FRY, L.J. I agree.

LOPES, L.J. Much to my surprise, it has been contended that an order for substituted service cannot be made when a debtor has gone out of this country to avoid service. In *Watt* v. *Barnett* (1), Mellor, J., said (at p. 186): "I think that the object of the 2nd rule of Order IX. was to obviate the difficulties that the plaintiff might be exposed to by reason of a defendant's going abroad and keeping abroad, and it being impossible to effect personal service, and to prevent the plaintiff's right being entirely defeated by reason of these difficulties. It was intended, in my opinion, in such cases to enable the Court to order substituted service, and that when such substituted service is directed it should have all the effects of personal service." Those observations of Mellor, J., have been over and over again approved, and I think the present case is well within them. I can come to no other conclusion than that the debtor went to Scotland to avoid service. *Fry* v. *Moore* (2) was an entirely different case. There, according to my recollection, the defendant was resident in Canada when the writ was issued.

Appeal dismissed.

Solicitors: *Perkins & Sawyer; E. F. & H. Landon.*

(1) 3 Q. B. D. 183. (2) 23 Q. B. D. 395.

W. L. C.

SAMMONS *v.* BAILEY. 1890 May 9.

Practice — Interrogatories — Objection to Answering — Order striking out Interrogatories—Rules of the Supreme Court, 1883, *Order* XXXI., *rr.* 6, 7.

An order cannot be made under Order XXXI, r. 7, striking out those parts of a set of interrogatories which the judge considers objectionable.

Any objection which the party interrogated may have to answering should be taken in the affidavit in answer.

APPEAL by the plaintiff from an order of Hawkins, J., at chambers, "that the interrogatory numbered 1 be struck out, that the interrogatory numbered 2 be amended by striking out the sentence beginning with 'if you did not, who, when, and where?' and the rest of the interrogatory, and that the interrogatory numbered 8 be wholly struck out."

The plaintiff had obtained leave to interrogate.

E. E. de Witt, for the plaintiff, in support of the appeal. The order ought not to have been made. The practice under Rules of the Supreme Court, 1875, Order XXXI., r. 5, explained in *Allhusen* v. *Labouchere* (1) was found inconvenient, owing to the waste of time in examining each interrogatory, and was altered by the Rules of 1883. According to the present practice, as regulated by Rules of the Supreme Court, 1883, Order XXXI., rr. 6, 7, any objection to answering should be taken in the affidavit in answer. The decision of Field, J., at chambers, in *McIlroy* v. *Duncan* (2) is a strong authority in support of this view.

J. W. Cooper, for the defendant, was called on. The plaintiff's contention would make Order XXXI., r. 7, a dead letter. "Any" in that rule must be taken to mean any, or all, or a part of any one or more. This is the view adopted in the Annual Practice, Edition for 1889, 1890, p. 518, in the note to Order XXXI., r. 7, where it is stated that "any or all of them" (the interrogatories) "can be struck out under the latter part of this rule."

GRANTHAM, J. We have no doubt as to this case. The defendant is obliged to admit that no authority can be found for the

(1) 3 Q. B. D. 654. (2) Weekly Notes for 1884, p. 48.

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order which he seeks to support. It was in order to obviate the waste of time and expense occasioned by the former practice that the rules were altered. It is not intended that the judge should go through all the interrogatories, and select those interrogatories, or parts of interrogatories, which he considers objectionable in each case. There is no authority for the statement in the Annual Practice which has been referred to, and it is clearly wrong.

VAUGHAN WILLIAMS, J., concurred.

Appeal allowed.

Solicitors for plaintiff: *Field, Roscoe & Co., for Prior, Cambridge.*

Solicitors for defendant: *Sharpe, Parkers, Pritchard, & Sharpe, for J. F. Symonds, Cambridge.*

P. B. H.

Feb. 18; *April* 19, 21, 25.

[IN THE COURT OF APPEAL.]

IN RE SPACKMAN. EX PARTE FOLEY.

Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*a*) (*b*), *ss.* 44, 49 — *Act of Bankruptcy—Assignment of Bankrupt's Property to Trustee for Benefit of Creditors generally—Money received after Notice of act of Bankruptcy—Charges of Solicitor retained to effect Arrangement with Creditors.*

The 1st sub-section of the 4th section of the Bankruptcy Act, 1883, provides that "a debtor commits an act of bankruptcy in each of the following cases: (*a*) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; (*b*) if in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property or of any part thereof." In order to constitute an act of bankruptcy under the above-mentioned provisions respectively:—

Under sub-s. 1 (*a*), there must be a "conveyance or assignment" in the proper sense of the term, by which the whole or substantially the whole of the debtor's property is vested in a trustee or trustees for the benefit of his creditors generally; other modes of disposition, not properly conveyances or assignments, such as a declaration of trust by the debtor, or a mere agreement by him that his property shall be dealt with for the benefit of creditors, will not suffice.

Under sub-s. 1 (*b*) there must be a conveyance, gift, delivery, or transfer of the debtor's property, or part thereof, with a fraudulent intention.

So held by the Court of Appeal.

Where a debtor retains a solicitor to effect an arrangement with his creditors,

and gives authority to the solicitor to sell property belonging to him and apply the proceeds to payment of the solicitor's charges under the retainer, upon the debtor's subsequently becoming bankrupt such solicitor cannot retain proceeds of the property in respect of charges subsequent to knowledge by him of an available act of bankruptcy committed by the debtor.

So held by the Divisional Court.

In re Sinclair (15 Q. B. D. 616) discussed and distinguished.

APPEAL from an order of the judge of the county court of Gloucestershire.

The facts, so far as material, were as follows:—An application was made in the county court by the trustee in bankruptcy of one Spackman against the appellants, Messrs. May, Sykes, & Batten, a firm of solicitors, for an order that they should pay over to the trustee certain moneys received by them in respect of charges due to them from the bankrupt, on the ground that such charges had been incurred and moneys received after knowledge by them of an available act of bankruptcy committed by the bankrupt. Spackman had been adjudicated bankrupt in December, 1886, upon an act of bankruptcy which took place on December 3 in that year. It appeared that the appellants had been retained on November 7, 1886, by the bankrupt, who was then in difficulties, for the purpose of effecting, if possible, some arrangement with his creditors. The bankrupt had about the time of such retainer handed over to the appellants a carriage, horses and harness belonging to him, with authority to sell the same and receive the proceeds, and had charged such proceeds with the amount of the costs and expenses being incurred by him to the firm under the retainer. The carriage and horses, &c., had been sold on November 25, 1886, and the proceeds of the sale received by the appellants, who claimed to retain them in respect of their charges under the above-mentioned retainer. The items in their bill of costs were some prior and some subsequent to November 22, 1886. It was alleged on the part of the trustee in bankruptcy that there had been an act of bankruptcy on November 22, 1886, of which the appellants had knowledge, and therefore they could only retain so much of the proceeds of the sale of the carriage, horses, &c., as was sufficient to cover their charges prior to that date, and must hand over the balance to the trustee.

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The facts with regard to the alleged act of bankruptcy on November 22 were as follows:—The bankrupt's available property besides the carriage, horses, &c., at that date, appeared to have consisted of certain household furniture on premises near Swindon, and also of some office furniture and books at Bradford in Wilts. He had given instructions to an auctioneer at Swindon named Redway to sell the furniture near Swindon. This coming to the knowledge of solicitors acting for some of the principal creditors, on November 20, 1886, the London agent of Mr. Jones, a solicitor representing a number of large creditors, called at the office of the appellants in London, and asked for an undertaking that the proceeds of sale should not be paid to the bankrupt, but retained for the creditors generally, threatening, if some arrangement of this kind were not made, proceedings would be taken. The appellants in consequence had an interview with the bankrupt, the result of which was that an arrangement was come to, in pursuance of which the appellants wrote to Jones's London agent on November 22 as follows: "We have seen Mr. Spackman this morning, and have arranged that all moneys received from the sale of furniture and other effects shall be retained for the benefit of the creditors, and shall not be handed over to Mr. Spackman. We have moreover taken his authority to pay any such moneys into the Wilts and Dorset Bank at Swindon in the names of this firm and Mr. Redway, the auctioneer, of Swindon. We shall write Mr. Jones very fully on the matter in the course of the day, and if there is any further information you require, we shall be pleased to give same to you." On the same date they wrote to Redway inclosing an authority which the bankrupt had signed, by which Redway was authorized to pay the proceeds of the sale of his effects into the Wilts and Dorset Bank at Swindon in the name of the members of their firm and Redway's name, to hold the same on behalf of his creditors. The furniture was sold on the next day, November 23, and the proceeds paid into the bank in accordance with the authority given by the bankrupt. It was contended on behalf of the trustee that the transaction of November 22 amounted to an act of bankruptcy, as being in effect an assignment of the whole, or substantially the whole, of the bankrupt's property for the benefit of his creditors generally

within the meaning of sub-s. 1 (*a*) of the 4th section of the Bankruptcy Act, or as being a fraudulent delivery or transfer of his property, or part thereof, under sub-s. 1 (*b*) of the same section. The County Court Judge held that the transaction was an act of bankruptcy within sub-s. 1 (*a*) as being an assignment of the bankrupt's property for the benefit of creditors generally, which was committed with the knowledge of the appellants, and therefore ordered that the appellants should pay over to the trustee the balance of the proceeds of the sale of the carriage, horses, &c., after deducting their charges prior to November 22. The appellants appealed against this order.

Feb. 18. *Bigham, Q.C.*, and *F. Cooper Willis*, for the appellants. The transaction of November 22 was not an assignment of the whole of the bankrupt's property. Assuming, however, that it was, the case comes within the principle laid down in *In re Sinclair*. (1) In that case it was held that sums paid to a solicitor by the bankrupt to defend him against proceedings in bankruptcy could not be recovered back, though the solicitor knew of an act of bankruptcy when they were paid. Here the charges were incurred in order to prevent bankruptcy, and the same principle applies.

Poole, Q.C., for the trustee in bankruptcy. The transaction of November 22 was in substance an assignment of the whole of the bankrupt's property for the benefit of creditors, and therefore an act of bankruptcy. The doctrine of *In re Sinclair* (1) does not apply to such a case as this. There the bankrupt paid ready money, which his friends had given him for the purpose of helping him out of his difficulties, to a solicitor for the purpose of opposing a bankruptcy petition. The doctrine of that case cannot be extended to a lien given on property belonging to the estate in the hands of other persons, or to costs incurred in endeavouring to make an arrangement with creditors.

CAVE, J. I am of opinion that the judgment of the county court judge in this case was right. There were two points before him—the first, whether there had been an act of bankruptcy

(1) 15 Q. B. D. 616.

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upon November 22; and, secondly, if there had been, whether this case falls within the doctrine of *In re Sinclair*. (1)

Now, with reference to the act of bankruptcy, it appears that all the available property which this bankrupt had was certain furniture and some other effects, horses, and a carriage; and that, in consequence of the representations of certain creditors, an arrangement was come to on November 22 by the bankrupt, by which the proceeds of this furniture, and also the proceeds of the other effects, should be retained for the benefit of the creditors, and should not be handed over to the bankrupt; and the bankrupt gave an authority to pay any moneys, the proceeds of his effects, into a bank, in the names of the appellants and Mr. Redway, to be held on behalf of the creditors. There was, therefore, an authority given at the instance of the creditors to receive and pay the proceeds of the furniture and other effects, representing the whole of the debtor's available property, into the bank, to be held, not for his use and at his disposal, but on behalf of his creditors. It seems to me that was an assignment of his property for the benefit of his creditors, within the meaning of sub-s. 1 (*a*) of the 4th section of the Act.

The other point which has been raised is one which, I confess, does not appear to me to have any substance whatever in it. In the case of *In re Sinclair* (1), which was before the Court some time ago, where a debtor requested a solicitor to represent and act for him upon the hearing of the petition for adjudication, and paid to the solicitor a sum of money in order to secure his services, it was held that, such payment being made bonâ fide and the service rendered bonâ fide, that sum of money, so paid for a good consideration actually given for it subsequently by the person to whom it was paid, could not be recovered by the trustee simply on the ground that the solicitor had received it after he was aware that the bankrupt had committed an act of bankruptcy. The case was likened to the case of a bankrupt whom his creditors, knowing he has committed an act of bankruptcy, will no longer trust, going to one of them and paying ready money for some article of ordinary necessity. Now in this case it is sought to extend that doctrine in two directions, and,

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as at present advised, I do not think that it ought to be extended in either direction—most certainly not in both.

In the first place, it is sought to make the doctrine applicable, not merely to the case of money in the hands of the debtor and parted with by him in consideration of a present service or goods presently handed to him, but to all assets which are outstanding in the hands of other persons, and which would undoubtedly become the property of the trustee. There appears to me to be no warrant for extending the doctrine so far. A man who takes a charge under these circumstances knows perfectly well that the property is the property of the trustee, and that the person affecting to charge it has got no right or authority so to do, except so far as such authority can be deduced from the doctrine of *In re Sinclair*. (1) On the other hand, a man who comes with ready money, which he presents, does undoubtedly offer something which, though primâ facie it may be the property of the trustee, on the other hand may not be so, because the bankrupt may have had a present of money made to him by some of his friends for the very purpose of providing for his defence against the petition, or of providing him with the necessaries of life. I thought it was going beyond what was necessary for the protection of the estate that, in every such case of a person receiving money for services then to be rendered or goods then to be supplied, he should be put upon an inquiry as to whose the money really was, and should be obliged to compel the bankrupt to satisfy him that the money was not the trustee's, and be subject to the risk of having to refund it in case it should turn out to be so. The cases, which most frequently occur, of a bankrupt whose credit is gone applying to his butcher or to his baker for necessary meat or bread for his daily sustenance shew how extremely difficult such a doctrine would be to work, and how much litigation it would be likely to lead to—litigation which would be far more costly and expensive than any remedy to be gained from it. On the other hand, it seems to me far too wide an extension of the doctrine to allow a man not only to part with money which he has in his pocket, in the shape of ready money, to procure

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necessaries, but also to charge any asset of his which may be outstanding in the hands of other persons.

But apart from this, and treating this money as if it had been ready money in Spackman's hands, which he paid to the appellants, the case does not seem to me to be at all within the principle laid down in *In re Sinclair*. (1) I have had occasion to say on more than one occasion that, when a man has committed an act of bankruptcy by executing a deed for the benefit of his creditors, it is the duty of the trustee under such deed to wait until it is seen whether any creditor will, within the necessary three months, take advantage of the act of bankruptcy and present a petition; that he ought not to take upon himself to deal with the trust fund until he has satisfied himself upon that point; and that, if a petition is presented in time, and adjudication follows, he must repay any money which he has received, however bonâ fide his conduct may have been, to the trustee who is appointed under the bankruptcy. Now here, to my mind, it is quite impossible to say that what was done by these appellants was in any sense a necessary within the principle laid down in *In re Sinclair*. (1) They were engaged in doing the very thing which the trustee of such a deed of arrangement is engaged in doing. In the case of such a deed the object is to make arrangements by which bankruptcy may be avoided altogether and the estate withdrawn from the Bankruptcy Court; and we have never yet held that the estate which ultimately finds its way into bankruptcy can be charged with the costs of taking proceedings of that kind. It would seem to me still more extraordinary if solicitors, who are not trustees under a deed of arrangement, who have no duties imposed upon them, and who know, or ought to know, the law, should be allowed to spend that money which they know will become the money of the trustee, if the petition is presented in due time, in trying to get the creditors to come together and agree not to take proceedings in bankruptcy. I am therefore of opinion in this case that the facts do not bring the appellants at all within the doctrine of *In re Sinclair* (1), a case which I am certainly not prepared at the present time to extend beyond the lines which

(1) 15 Q. B. D. 616.

were laid down in the case itself, in either of the directions in which it is sought to be extended.

A. L. SMITH, J. I am of the same opinion.

Appeal dismissed.

The appellants appealed against this decision.

Henn Collins, Q.C., and *F. Cooper Willis*, for the appellants. There was no assignment of his property by the bankrupt within the meaning of s. 4, sub-s. 1 (*a*) of the Bankruptcy Act, 1883. There was a mere order or authority to sell and to deal with the proceeds of sale which was revocable. Even if the authority had become irrevocable by the bankrupt, there was no assignment. *In re Glanville.* (1) The property in the goods remained in the bankrupt until the sale, and until then an execution creditor could have seized the goods. The arrangement of November 22 was intended to apply to the furniture at Swindon only, which did not constitute substantially the whole of the debtor's property. Assuming that there was an act of bankruptcy on November 22, the principle of *In re Sinclair* (2) is applicable to this case. (3)

Cooper Willis, Q.C., and *Wace* (*Poole, Q.C.*, with them), for the trustee. The transaction of November 22 was an act of bankruptcy, either as being an assignment of the bankrupt's property within the meaning of sub-s. 1 (*a*) of s. 4, or as being a fraudulent delivery or transfer of his property, or part thereof, within sub-s. 1 (*b*).

Under the former law of bankruptcy before the Act assignments of a debtor's property to trustees for the benefit of creditors were considered fraudulent as against the bankruptcy laws, because their effect was to prevent the administration of the estate in bankruptcy. The transaction of November 22 amounted to a binding agreement by the debtor, for which the antecedent debts were a good consideration, that the whole or substantially

(1) 2 Morrell's Bank. Cases, 71.

(2) 15 Q. B. D. 616.

(3) The argument on this last point is not given in detail, as it will be seen that the Court of Appeal decided the case on the ground that there was no act of bankruptcy on November 22.

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the whole of his property should be sold and the proceeds held by trustees for the benefit of creditors; and, when the goods were sold, the property actually passed from the bankrupt. There was an irrevocable appropriation of the property for the benefit of the creditors, and the creation of a trust in respect of the proceeds in their favour. The authority given by the debtor could not, it is contended, have been revoked or the goods taken in execution. The transaction having been communicated to creditors, became irrevocable: *Siggers* v. *Evans.* (1) There was a good equitable assignment of the property. The effect of sub-s. 1 (*a*) cannot be confined to assignments in the strict legal sense. If a debtor could make an arrangement by which the control of all his property was given to some one else, with authority to sell it and hold the proceeds for the creditors, without committing an act of bankruptcy, the provisions of the Act would be rendered nugatory. If not an assignment, the transaction of November 22 was a fraudulent transfer within sub-s. 1 (*b*): *Smith* v. *Cannan* (2); *Ex parte Wensley.* (3) If the transaction of November 22 did not relate to the whole or substantially the whole of the debtor's property, it is contended that that is not necessary to constitute an act of bankruptcy under the words of sub-s. 1 (*a*); and if, as is contended, there was a fraudulent transfer under sub-s. 1 (*b*), it is expressly provided that such a transfer of part of the debtor's property is sufficient. *In re Sinclair* (4) is not in point. The money in that case was provided by the debtor's friends for his assistance.

Henn Collins, Q.C., in reply. An assignment must mean something by which the assignor divests himself of the property in the things assigned, and vests it in the assignee: *Whitwell* v. *Thompson* (5); *Bowker* v. *Burdekin.* (6) Possibly an agreement amounting to a present equitable assignment might suffice; but there must be an intention at once to pass the property to an assignee. A declaration of trust or a contract to assign in futuro is not an assignment. In the old Bankruptcy Act of 1 Jac. 1, c. 15, s. 2, the words by which this kind of act of bankruptcy was

(1) 5 E. & B. 367; 24 L. J. (Q.B.) 305.
(2) 22 L. J. (Q.B.) 290.
(3) 1 De G. J. & S. 273.
(4) 15 Q. B. D. 616.
(5) 1 Esp. 68.
(6) 11 M. & W. 128, 146.

created were "grant or conveyance." There was clearly no fraudulent transfer by the debtor in this case.

Cur. adv. vult.

April 25. The following judgments were delivered:—

LORD ESHER, M.R. The question in this case arises on an application made by the trustee in bankruptcy against the appellants, a firm of solicitors, for the purpose of recovering from them money received by them in respect of charges due to them from the bankrupt prior to the bankruptcy. The claim of the trustee is made on the ground that, at the time when the appellants received the money claimed, the bankrupt had committed an act of bankruptcy, of which they knew. If the transaction in question amounted to an act of bankruptcy, it seems clear that they knew of it, for the transaction was carried out through them. The whole question, therefore, resolves itself into this, viz., whether the transaction which took place in November amounted to an act of bankruptcy. It is argued that it did by reason of sub-s. 1 (*a*) of s. 4 of the Bankruptcy Act, 1883, because it was an assignment of the bankrupt's property for the benefit of creditors within the meaning of that sub-section. We must, therefore, consider the nature of this transaction. The substance of the transaction is alleged to have been that the bankrupt came to an agreement that certain persons should take control of his property, should have the whole, or substantially the whole, of it sold, and that the proceeds of the sale should be paid into a bank in the names of certain persons, in order that they might ultimately be distributed amongst his creditors. This agreement was suggested, if not forced upon him, by the threats of a considerable number of creditors acting through a solicitor, who represented certain creditors. Taking it, therefore, that the transaction was effected at the instance of creditors, and that it was substantially an agreement that the whole of the bankrupt's property should be realized and the proceeds distributed amongst all the creditors, the question is whether such a transaction is an act of bankruptcy. I do not think that it can be said under the circumstances to be an agreement with intent to defeat or delay creditors, and fraudulent on that ground. It is not found

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to be an act of bankruptcy on the ground of fraud. Therefore the transaction clearly cannot be considered as coming within sub-s. 1 (*b*) of the 4th section. The sole question is whether it is within sub-s. 1 (*a*). That sub-section relates to cases where the debtor makes "a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally." What is the meaning of that language? I think it must be construed, having regard to the known meaning and acceptation of those phrases in bankruptcy law before the Act. I think there was a well-known meaning attached to the term "assignment" in bankruptcy law, as used in relation to this subject. It applied to cases where a debtor had executed a deed which assigned all, or substantially all, his property to a trustee or trustees for the benefit of his creditors generally. If the phrase had a well-known meaning in bankruptcy law before the Act, I think it has that meaning in the section, and that meaning only. That being so, no declaration of trust or mere contract is an act of bankruptcy within the meaning of those words in the sub-section. There must be an assignment for the benefit of creditors according to the well-established meaning of the phrase in bankruptcy law before the Act, viz., an assignment of the property by deed to a trustee for the benefit of creditors. It may be asked why this sub-section was inserted in the Bankruptcy Act, 1883. I think that it was probably inserted to prevent any question with regard to the necessity for inquiry as to the existence of an intention to interfere with the administration of the property in bankruptcy, and to make it clear that, where the debtor has assigned all his property for the benefit of creditors, such assignment, apart from any question of intention, is per se to be considered an act of bankruptcy. Taking the meaning of the sub-section to be as I have stated, an assignment of part of the debtor's property will not be within it. There must be an assignment of the whole, or substantially the whole, of his property. It follows from what I have said that, whether this transaction amounted to a declaration of trust for the benefit of creditors, or a contract that the property should be dealt with in a certain way for their benefit, or whatever it was, unless it was an assignment of the whole, or substantially the whole, of the debtor's property for

the benefit of creditors, it was not an act of bankruptcy. I do not think it was an assignment, and therefore there was no act of bankruptcy at the time when the solicitors received this money. For these reasons I think the appeal must be allowed.

FRY, L.J. I will first shortly state the facts as I understand them. In November Spackman appears to have been in difficulties. His property consisted principally of certain furniture and effects near Swindon, and of books and office furniture at Bradford, in Wiltshire. He had given authority to an auctioneer named Redway to sell the Swindon property, which authority was, of course, revocable. That being the position of affairs, the creditors became aware of his intention to sell the Swindon property; and, in consequence, the London agent of one Jones, the solicitor of certain creditors, had an interview with May & Co., the solicitors for the debtor, at which he intimated to them that, unless an undertaking were given that the proceeds of the sale should be set aside for the creditors, he would commence proceedings against the debtor. That interview took place on the 20th November; on the 22nd the debtor saw May & Co., and an arrangement, as appears from their letter of that date, was come to between him and them that the proceeds of sale of substantially all the debtor's effects should be paid into a bank to the credit of certain trustees, viz., the members of the firm of May & Co. and Redway, for the benefit of the creditors. On the same day authority was given by the debtor to Redway to pay the proceeds of sale of his effects at Swindon into the bank to the credit of such trustees to hold for the benefit of the creditors. The effect of this transaction was probably to render the authority to sell given to Redway irrevocable. The sale of the Swindon effects took place the next day, and the proceeds of such sale were paid into the bank in accordance with the arrangement. It is clear that on 22nd or 23rd November May & Co. had notice of the transaction, because it was brought about by them. The question therefore is, whether the transaction was an act of bankruptcy. That question turns upon sub-s. 1 of s. 4 of the Bankruptcy Act, 1883. The 1st sub-section of that section

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says that a debtor commits an act of bankruptcy in each of the following cases: (*a*) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; (*b*) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof. I will first consider the contention on sub-s. 1 (*b*). It was contended that this transaction was fraudulent, and so came within the words of that clause. But I think that the question whether the transaction is fraudulent within the clause is a question of fact in each case. Here the transaction could only be said to be fraudulent on the ground that it tended to defeat or delay creditors. But it was carried into effect at the instigation and for the benefit of creditors. As a matter of fact, I do not think that it was shewn to be fraudulent. Then the question remains whether it was an assignment of the debtor's property to trustees for the benefit of creditors generally within sub-s. 1 (*a*). I think that the language of sub-s. 1 (*a*) and sub-s. 1 (*b*) respectively must be contrasted in order to arrive at the meaning of the words "conveyance or assignment" in the former. Sub-s. 1 (*a*) speaks of "conveyance or assignment." Sub-s. 1 (*b*) speaks of "conveyance, gift, delivery, or transfer." Having regard to the language so used, it seems clear to me that the legislature must have had in their minds the fact that there are other modes of disposition, by which property may be rendered subject to be applied for the benefit of creditors, besides a conveyance or assignment in the proper sense of those terms. The debtor himself might declare himself to be a trustee of his property for the benefit of creditors. Such a mode of disposing of property is well known to the law; but it is not an assignment in the proper sense of the term. Again, property may be dealt with in various other modes, e.g., by agreement to assign, by payment, or by delivery. All these are modes of disposition by which property may be dealt with for the benefit of creditors, but which are not properly assignments; yet we find that the legislature, which uses the expressions, "gift, delivery, or transfer," in sub-s. 1 (*b*), only uses the expressions "conveyance or assignment" in sub-s. 1 (*a*). It appears to me, therefore, plain that, though they had in their minds

the fact that there were many other modes of dealing with property, they were dealing in sub-s. 1 (*a*) with "conveyance or assignment" only. Furthermore, the expression "his property" in sub-s. 1 (*a*) must mean, I think, the whole, or substantially the whole, of the debtor's property. For here, again, there is a contrast between sub-s. 1 (*a*) and sub-s. 1 (*b*). Sub-s. 1 (*a*) deals with a conveyance or assignment of the debtor's property. Sub-s. 1 (*b*) deals with a fraudulent conveyance, gift, delivery, or transfer of his property or any part thereof. If the intention had been that an assignment of any part of the debtor's property should be within sub-s. 1 (*a*), I think the legislature would have said so expressly. I think that the true meaning of sub-s. 1 (*a*) is that a formal conveyance or assignment, properly so called, of the whole, or substantially the whole, of the debtor's property to a trustee or trustees for the benefit of his creditors generally is to be deemed an act of bankruptcy in itself without any evidence of a fraudulent intention in executing it; but that sub-s. 1 (*a*) was not intended to deal with the various other dispositions of the debtor's property which might be made for the benefit of his creditors. When these are fraudulent, they are dealt with by sub-s. 1 (*b*). The result is that there was not in this case an assignment within sub-s. 1 (*a*); and the transaction was not shewn to be fraudulent, so as to come within sub-s. 1 (*b*). Therefore, I come to the conclusion that there was no act of bankruptcy before the receipt of these moneys by the appellants. For these reasons, I think that the decision of the learned judges below was wrong and should be reversed.

LOPES, L.J. The question here really is, whether what took place was an assignment of the debtor's property for the benefit of his creditors generally within the meaning of sub-s. 1 (*a*) of s. 4 of the Bankruptcy Act, 1883. I think that it was not. The words "conveyance or assignment" are words of art well understood by lawyers. I think they refer to an instrument under seal, actually transferring the legal and equitable interest in property, so as to take it out of the assignor and vest it in the assignee or assignees. This case cannot be said to come within sub-s. 1 (*b*) of the section, which relates to fraudulent trans-

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actions. There is no proof of anything of a fraudulent nature about this transaction.

With regard to the case of *In re Sinclair* (1), I desire to express no opinion as to that case; but it seems to me that the present case is not within what was there laid down.

Appeal allowed.

Solicitors for appellants: *May, Sykes, & Batten.*

Solicitors for respondents: *Eyre & Co., for C. J. Jones, Trowbridge.*

E. L.

May 31.

[IN THE COURT OF APPEAL.]

KEARLEY *v.* THOMSON AND ANOTHER.

Illegal Contract—Partial Performance—Bar to Action for Money paid.

Where money is paid under an illegal contract which has been partially carried into effect, the money cannot be recovered back.

The defendants were solicitors to the petitioning creditor in certain bankruptcy proceedings, and had incurred costs which were to be paid out of the estate. The plaintiff, a friend of the bankrupt, offered to pay to the defendants a sum of money for these costs, which had not been paid owing to want of assets, on their undertaking not to appear at the public examination of the bankrupt, and not to oppose his order of discharge. The defendants, with the consent of their client, agreed to this, and received the money. They did not appear at the public examination of the bankrupt, and, before any application for his discharge had been made, the plaintiff brought an action to recover back the money from the defendants:—

Held, that, though the contract was illegal, the partial performance of it prevented the plaintiff from recovering back the money paid under it.

APPEAL from a judgment of the Queen's Bench Division in favour of the defendants.

The action was brought under the following circumstances:—The defendants were solicitors, and acted for a client in presenting a petition in bankruptcy against one William Clarke, against whom a receiving order was made. The costs of the petitioning creditor were ordered to be paid out of the estate. Before the public examination of the bankrupt came on the plaintiff, who was a friend of the bankrupt, had an interview with the defendants,

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at which a discussion arose as to the defendants' costs in the bankruptcy proceedings, none of which, from want of assets in the bankruptcy, had been paid, and the defendants undertook not to attend on the debtor's public examination, or to oppose his discharge, provided the plaintiff paid them an agreed sum for such costs. The plaintiff accordingly paid to the defendants at the time 20*l.*, for which the following receipt was given: "At the request of Mr. Kearley we have received from him the sum of 20*l.* on account of our costs herein, and he is to pay us before twelve to-morrow the further sum of 20*l.*, and in consideration of this sum of 40*l.* we waive all our claim for costs, and undertake not to appear at the bankrupt's public examination, nor to oppose his order of discharge. Thomson & Ward." The further sum of 20*l.* was paid to the defendants. The arrangement was made by the defendants with the consent of their client and for his benefit. The debtor passed his public examination, at which the defendants did not appear. At the time the action was brought the debtor had not applied for his order of discharge. The plaintiff claimed a return of the 40*l.* that he had paid to the defendants as above mentioned, and the defendants offered to have their costs taxed, and to return to the plaintiff the balance (if any) that might remain of the 40*l.*, after deducting the taxed costs. The plaintiff refused this offer and brought this action for the return of the money he had paid. The case was tried before Field, J., without a jury, and the parties were left to move for judgment. The Queen's Bench Division (Huddleston, B., and Stephen, J.) ordered judgment to be entered for the defendants.

The plaintiff appealed.

1890. Feb. 20. *Crump, Q.C.*, and *Woolf, Q.C.*, in support of the appeal. The contract was illegal: *Hall* v. *Dyson.* (1) The plaintiff is not trying to make out his case through the medium and by the aid of the illegal transaction, which is the test laid down in *Taylor* v. *Chester* (2), for determining whether the plaintiff and defendant are in pari delicto; he is trying to set aside the transaction. He can do this so long as the contract is not fully carried out, for the money remains his, and he can

(1) 17 Q. B. 785. (2) Law Rep. 4 Q. B. 309.

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recover it back. This is the effect of the judgment of Mellish, L.J., in *Taylor* v. *Bowers* (1), and of Lord Esher, M.R., in *Herman* v. *Jeuchner*. (2)

[They cited also *Tappenden* v. *Randall* (3) and *Aubert* v. *Walsh*. (4)]

Edward Clayton, (*Jelf, Q.C.*, with him), for the defendants. The property in the money passed under the contract to the defendants, and so, if the contract was illegal, the illegality must be the basis of the plaintiff's claim. The plaintiff and defendants are in pari delicto, and the maxim "potior est conditio possidentis" applies. The authorities do not support the proposition that it is necessary, in order to prevent the plaintiff from recovering, that the contract should have been fully performed; it is sufficient if there has been performance of a substantial part. [He also proposed to submit (inter alia) that, under the Bankruptcy Act, 1883, the contract was legal, but was stopped.]

Crump, Q.C., in reply.

1890. March 31. FRY, L.J. I have been asked by the Lord Chief Justice to deliver the judgment in this case, and I may also state that I have had an opportunity of consulting the Master of the Rolls on the judgment I am about to deliver, and he has authorized me to express his concurrence with it.

The facts are shortly these:—A petition in bankruptcy was presented by one Baynes against Clarke, and a receiving order was made. The defendants were the solicitors acting for the petitioning creditor. That being the condition of things, the plaintiff, who appears to have been a friend of Clarke, intervened, and on October 6, 1887, Messrs. Thomson & Ward, the defendants, wrote this letter to the plaintiff Kearley:—"Re Clarke. At the request of Mr. Kearley we have received from him the sum of 20*l.* on account of our costs herein, and he is to pay us before twelve to-morrow a further sum of 20*l.*; and in consideration of this sum of 40*l.* we waive all our claim for costs, and undertake not to appear at the bankrupt's public examination, nor to oppose his order of discharge." That was signed by

(1) 1 Q. B. D. 291.
(2) 15 Q. B. D. 561.
(3) 2 B. & P. 467.
(4) 3 Taunt. 277.

the defendants. On the following day, it appears that the second sum of 20*l.* was paid, and a receipt was given by the defendants in these terms:—"7th October, 1887. Re Clarke. Received of Mr. Kearley the further sum of 20*l.*, mentioned in our receipt of yesterday." On the same October 7 the public examination of the bankrupt took place, and, in accordance with the stipulation in the letter of the 6th, at that public examination the defendants did not appear.

The tendency of such a bargain as that entered into between the plaintiff and the defendants is obviously to pervert the course of justice. Although the defendants were under no obligation to appear, they certainly were under an obligation not to contract themselves out of the opportunity of appearing. The case of *Hall* v. *Dyson* (1) was referred to in support of the suggestion that this agreement was illegal as interfering with the course of justice, and it was not argued that it was legal. I think, therefore, there can be no doubt the agreement must be taken to be illegal.

As a general rule, where the plaintiff cannot get at the money which he seeks to recover without shewing the illegal contract, he cannot succeed. In such a case the usual rule is potior est conditio possidentis. There is another general rule which may be thus stated, that where there is a voluntary payment of money it cannot be recovered back. It follows in the present case that the plaintiff who paid the 40*l.* cannot recover it back without shewing the contract upon which it was paid, and when he shews that he shews an illegal contract. The general rule applicable to such a case is laid down in the very elaborate judgment in *Collins* v. *Blantern* (2), where the Lord Chief Justice says: "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back." To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of those is the case of oppressor and oppressed, in which case usually the oppressed party may recover the money back from

(1) 17 Q. B. 785. (2) 1 Sm. L. C. 7th ed. 369.

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the oppressor. In that class of cases the delictum is not par, and therefore the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract.

There is suggested to us a third exception, which is relied on in the present case, and the authority for which is to be found in the judgment of the Court of Appeal in the case of *Taylor* v. *Bowers*. (1) In that case Mellish, L.J., in delivering judgment, says at p. 300: "If money is paid, or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out." It is remarkable that this proposition is, as I believe, to be found in no earlier case than *Taylor* v. *Bowers* (1), which occurred in 1867, and, notwithstanding the very high authority of the learned judge who expressed the law in the terms which I have read, I cannot help saying for myself that I think the extent of the application of that principle, and even the principle itself, may, at some time hereafter, require consideration, if not in this Court, yet in a higher tribunal: and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice. But even assuming the exception to exist, does it apply to the present case? What is the condition of things if the illegal purpose has been carried into effect in a material part, but remains unperformed in another material part? As I have already pointed out in the present case, the contract was that the defendants should not appear at the public examination of the bankrupt or at the application for an order of discharge. It was performed as regards the first; but the other application has not yet been made. . Can it be contended

(1) 1 Q. B. D. 291.

that, if the illegal contract has been partly carried into effect and partly remains unperformed, the money can still be recovered? In my judgment it cannot be so contended with success. Let me put an illustration of the doctrine contended for, which was that partial performance did not prevent the recovery of the money. Suppose a payment of 100*l.* by A. to B. on a contract that the latter shall murder C. and D. He has murdered C., but not D. Can the money be recovered back? In my opinion it cannot be. I think that case illustrates and determines the present one.

I hold, therefore, that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under that illegal contract can be recovered back. We were pressed with the observations of the Master of the Rolls in *Herman* v. *Jeuchner* (1), where it was said that he had recognised the proposition that so long as the contract remained imperfectly performed the money could be recovered back. In my opinion, the language used by the Master of the Rolls does not bear that construction, because in that case the Court thought the contract had been fully performed, and, therefore, no doubt, in speaking of performance he spoke of full performance; but, whatever the construction of those words may be, I have, as I have already stated, the authority of the Master of the Rolls to state his concurrence with the view I have expressed with regard to the partial performance of an illegal contract.

For these reasons, I am of opinion the appeal fails, and should be dismissed accordingly.

LORD COLERIDGE, C.J. I agree.

Appeal dismissed.

Solicitors for plaintiff: *Aird & Hood.*

Solicitors for defendants: *Ward, Perks & McKay.*

(1) 15 Q. B. D. 561.

A. M.

1890

May 9.

STOY *v.* REES.

Practice—Writ of Summons—Indorsement—Address of Plaintiff—Residence—Rules of Supreme Court, 1883, *Order* IV., *r.* 1, *Appendix A, Part I., Form* 1.

It is not a sufficient compliance with Order IV., r. 1, and Appendix A, Part I., Form 1, to state in the indorsement upon a writ of summons the place where the plaintiff carries on business. The indorsement must state where he resides.

APPEAL from chambers.

The plaintiff in an action on a bill of exchange issued a writ, the indorsement on which stated that the plaintiff resided at 145, Palmerston Buildings, Old Broad Street, in the city of London. The plaintiff's office was at that address, but he resided elsewhere.

The defendant applied to strike out the writ. The master made no order.

On appeal, Hawkins, J., held that the indorsement of the plaintiff's address on the writ was insufficient, but gave leave to amend it on payment of costs.

The plaintiff appealed.

Scarlett, for the plaintiff. The indorsement is sufficient, and no amendment is required. Order IV., r. 1, provides that "In all cases where a writ of summons is issued out of the central office the solicitor . . . . shall indorse upon the writ . . . . the address of the plaintiff," and the Form (Appendix A, Part I., No. 1), contains the words, "the said plaintiff who resides at." These provisions are satisfied by a statement of the plaintiff's place of business. In the case of a writ issued by a firm under Order XVI., r. 14, a statement of the business address of the firm would clearly be sufficient. In *Dawes* v. *Solomonson* (1), Park, J., said: "The object of the statute" (2 & 3 Wm. 4, c. 39) "was to give to the defendant full information as to the place where he might go for the purpose of settling the action." This object is best effected by giving the address where the plaintiff is likely to be found during business hours.

(1) 6 Scott, 596.

[He also referred to *Lewis* v. *Davison* (1); *Yardley* v. *Jones*.(2); *Ablett* v. *Basham* (3); *Attenborough* v. *Thompson* (4); *Mee* v. *Denbigh* (5); *Re a Solicitor*. (6)]

John Chester, for the defendant. The indorsement is insufficient. The word "address" in Order IV., r. 1, and the word "resides" in Appendix A, Part I., Form 1, should be construed according to the ordinary meaning of the words. The true meaning is the plaintiff's place of residence, his domicil or home: *Lambe* v. *Smythe* (7); *Maybury* v. *Mudie*. (8)

In Order VII., r. 2, "places of residence" clearly means dwelling-places, and the same interpretation should be adopted with regard to the other rules. It is important that a defendant, who in certain cases may be entitled to ask for security for costs, should have an opportunity of ascertaining what means the plaintiff possesses.

GRANTHAM, J. I am of opinion that we ought to affirm this order, and that the words "address" and "reside" must be construed according to their ordinary meaning. To hold otherwise would open the door to fraud.

VAUGHAN WILLIAMS, J., concurred.

P. B. H.

The plaintiff appealed to the Court of Appeal.

May 22. *Scarlett*, for the plaintiff.
Ashton Cross, for the defendant.

THE COURT (Lord Esher, M.R., Fry, and Lopes, L.JJ.) affirmed the order of the Queen's Bench Division.

Appeal dismissed.

Solicitor for plaintiff: *Waples Canwarden.*
Solicitor for defendant: *Charles Rogers.*

(1) 3 Dowling, 272.
(2) 4 Dowling, 45.
(3) 5 E. & B. 1019; 25 L. J. (Q.B.) 239.
(4) 2 H. & N. 559; 27 L. J. (Ex.) 23.
(5) 27 Solicitors' Journal, 617.
(6) 33 Solicitors' Journal, 301.
(7) 15 M. & W. 433.
(8) 5 C. B. 283.

E. L.

1890
May 1.

[IN THE COURT OF APPEAL.]

DE ROTHSCHILD FRÈRES *v.* MORRISON, KEKEWICH & CO.
LA BANQUE DE PARIS ET DES PAYS BAS *v.* THE SAME.
LA BANQUE DE FRANCE *v.* THE SAME.

Practice—Interpleader—Claim of Applicant for "Charges"—Jurisdiction to order Payment—Wharfage Charges—Order LVII., *rr.* 2, 15.

The Court or a judge has power, under Order LVII., r. 15, to make an order for payment of the charges of a wharfinger who has interpleaded.

APPEALS from judgments of Lord Coleridge and Fry, L.J., sitting as a Divisional Court.

The actions were interpleader issues directed to try the right to certain copper, and the orders appealed against directed the payment of wharfage charges to Logan, a wharfinger, by the defendants under the following circumstances. Morrison, Kekewich & Co., the defendants, deposited with Logan a large amount of copper, and received delivery warrants for the same, made out in their names and expressed to be given subject to the wharfinger's charges. These warrants the defendants indorsed and forwarded to their principals, the Société des Metaux, in Paris, and ultimately the warrants came into the hands of the plaintiffs in the three actions. In May, 1889, the present defendants brought an action against Logan claiming delivery of the copper, although they did not claim to be holders of the warrants. About the middle of June in the same year the present plaintiffs claimed the copper as holders of the warrants. The wharfinger thereupon applied for leave to interplead, on the ground that he had no interest in the copper except for wharfage charges; and orders were made accordingly and issues directed in which the holders of the warrants were made plaintiffs, and Morrison, Kekewich & Co. defendants, and the action against Logan was stayed, costs being reserved. At a subsequent date the defendants gave notice relinquishing their claim to the copper, and thereupon an order was made by a Master which, as amended by Day, J., at chambers, directed, in the case of the first of these three actions, that the

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order for an issue should be discharged with costs to be paid by the defendants, and that Logan's costs in the action by the present defendants were to be paid by them, including costs of and occasioned by the interpleader, and that the charges for wharfage of the copper from June 18, 1889, to January 29, 1890 (the date of the Master's order), should be paid by the defendants. Similar orders were made in the other two cases.

The Divisional Court affirmed the orders of the Judge, on the ground that Logan was interested and had not been made a party to the proceedings. The defendants appealed against so much of the orders as directed payment by them of the wharfinger's charges, and served notice on Logan, who appeared on the argument of the appeal.

Barnes, Q.C., and *Hugh Boyd*, for the defendants. The Court has no jurisdiction to order the payment of these charges. A sheriff's charges are regulated by statute; but in no other case is the applicant entitled to more than costs. The "other matters" referred to in Order LVII., r. 15 (1), as within the discretion of the Court or a judge are matters which arise in the interpleader, and do not include charges which accrued before the proceedings commenced. In *Attenborough* v. *St. Katharine's Dock Co.* (2), an order was made that the defendants' costs and charges should be a first charge upon the proceeds of the sale; but no objection was made to this, and the point was not argued. They cited *Dabbs* v. *Humphries* (3); *Cotter* v. *Bank of England.* (4)

[They also argued that, even if there was jurisdiction, the order should not have been made.]

Pollard, was heard for the plaintiffs.

Wood Hill, and *English Harrison*, appeared for the plaintiffs in the other actions.

(1) Order LVII., r. 2: "The applicant must satisfy the Court or a judge by affidavit or otherwise—(*a*) that the applicant claims no interest in the subject-matter in dispute, other than for charges or costs." Rule 15: "The Court or a judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable."

(2) 3 C. P. D. 450.

(3) 3 Dowl. 377.

(4) 3 Moore & Scott, 180.

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Loehnis, for the wharfinger.

Boyd, was heard in reply.

LORD ESHER, M.R. In this case we must deal with the matter as if all three parties were properly before us, and make the order which we think the judge, having all the parties before him, ought to have made. No point has been taken as to the validity of any of the intermediate steps in the case, or as to our power to entertain this appeal, and I proceed to deal with it on that footing.

The facts are shortly these. A large quantity of metal was deposited by the defendants, as agents for the Société des Metaux, in their own name, with Logan, a wharfinger, who gave the defendants the ordinary delivery warrant, which they indorsed and forwarded to their principals, who I suppose indorsed it on, so that ultimately it was indorsed to the plaintiffs, who thereupon became owners of it, and had primâ facie a right to have the goods delivered to them on payment of the wharfinger's charges. Before any claim for delivery under the warrant, the defendants claimed the goods, saying that, notwithstanding the indorsement of the warrant, they were entitled to them, and they brought an action against Logan and said he was bound to give the goods up to them. Soon after that, and before anything more had been done, the plaintiffs claimed the goods by virtue of the warrant. They go to the wharfinger and ask for the goods according to the undertaking in the warrant, and they are willing to pay the charges that were due at that time. The wharfinger had thus two people claiming the goods, and he interpleaded, and an issue was settled, to be tried between the two claimants. The defendants in that issue afterwards abandoned their claim, the effect of which is the same as if the issues had been found against them. As there was no Court or judge who tried the issue, it went before a Master, and then before a judge at chambers, to be disposed of. It is said that the judge had a right to deal only with the costs of the wharfinger, who is one of the parties to the original interpleader proceedings, and not with his charges. Order LVII., r. 2, says that the applicant is to satisfy the judge that he claims no interest in the subject-matter in dispute other than for charges

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Lord Esher, M.R.

and costs. If he does this and an order is made, what is to be done after the issues have been determined? The applicant is still interested in the proceedings, and he has informed the judge of the claim for charges. Then comes rule 15 of the same order, and the judge is to make such order as to costs and "all other matters" as may be just and reasonable. This must certainly include all matters that the applicant was entitled to bring before the judge at first, and that the judge could reserve for consideration till the issues were determined. It seems to me clear, therefore, that the judge was entitled to deal with this claim. The decision in *Attenborough* v. *St. Katharine's Dock Co.* (1) is a direct authority in the Court of Appeal that such charges may be dealt with, for the Court did deal with them, and the answer to the application shews that the matter had been considered by all the members of the Court. If any reasoning is wanted to justify the decision in that case (as the point does not appear to have been argued), that reasoning is supplied by the rules, as I have already pointed out. We come, therefore, to the conclusion that there was jurisdiction; and as, in our opinion, the discretion of the learned judge was soundly exercised in charging the defendants with the wharfage dues from the time when they interfered with the rights of the plaintiffs, the appeal must be dismissed.

Lopes, L.J. I entirely agree, and have only a few words to add as to the jurisdiction to make the order. Looking at rules 2 and 15 of this order, it appears to me to be perfectly clear that there was jurisdiction. The applicant has under rule 2 to disclaim all interest except for "charges or costs." Charges as to what? Beyond all question, charges which have relation to the subject-matter of the interpleader. Then, under rule 15, the judge is to make an order "in and for the purposes of the interpleader" as to "costs and all other matters." It seems to me impossible to read these words without seeing that they must include the charges dealt with in s. 2—those charges, as I have pointed out, having relation to the subject-matter of the interpleader proceedings. Having jurisdiction the judge has

(1) 3 C. P. D. 450.

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also discretion, which has been, in my opinion, very properly exercised.

Appeals dismissed.

Solicitors for plaintiffs: *Dawes & Sons*; *Markby, Stewart & Co.*
Solicitors for defendants: *William A. Crump & Son.*
Solicitors for applicant: *Rowcliffes & Co., for Stone, Fletcher, & Hull, Liverpool.*

A. M.

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ARTIZANS AND LABOURERS DWELLINGS IMPROVEMENT ACT, 1875—*continued.*

and therefore that the owner of a house, to which there had been access of light over land purchased by a local authority under the Act for a period of ten years before and ten years after such purchase, did not gain an easement of light under the Prescription Act by reason of such twenty years' enjoyment.—*Semble*, such an owner would be entitled to compensation to the extent to which the value of his house might be diminished by the operation of the section. Barlow *v.* Ross - - - C. A. 381

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BAILMENT—*Title of Bailor—Determination of —Jus Tertii—When Bailee estopped from setting up.*] In an action for wrongful detention of certain copper which had been bailed by the plaintiffs to the defendants, as warehousemen, to hold to the plaintiffs' order, the defendants sought to administer interrogatories as to whether the plaintiffs had not since the date of the bailment sold the copper to a firm of M. K. & Co., and been paid the price, and whether they had not indorsed and handed to M. K. & Co. delivery orders in respect of the copper. It appeared that M. K. & Co. were claiming the copper from the defendants; but it was admitted by the defendants that they were defending the action for their own interest alone, and not under the authority of M. K. & Co.:—*Held*, that the defendants could not as against their bailors set up the title of third parties, under whose authority they did not claim to defend, and that consequently the facts to which the interrogatories were directed not affording any defence to the action, the interrogatories must be disallowed. Rogers & Co. *v.* Lambert & Co. - - - 573

BANKER — *Bank of England — Mandamus — Registration of Transfer of Stock—Joint Tenancy and Tenancy in Common—Application to register Transfer of Stock in joint names of a Corporation and an Individual—5 & 6 Wm. & Mary, c. 20, s. 19—National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *ss.* 1, 22.] The Court will not grant a mandamus requiring the Bank of England to register a transfer of consols in the joint names of a corporation and an individual. Law Guarantee and Trust Society *v.* Governor and Company of Bank of England - 406

BANKRUPTCY—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*a*) (*b*), *ss.* 44, 49—*Act of Bankruptcy—Assignment of Bankrupt's Property to Trustee for Benefit of Creditors generally — Money received after Notice of act of Bankruptcy —Charges of Solicitor retained to effect Arrangement with Creditors.*] The 1st sub-section of the 4th section of the Bankruptcy Act, 1883, provides that "a debtor commits an act of bankruptcy in each of the following cases: (*a*) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; (*b*) if in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property or of any part thereof." In order to constitute an act of bankruptcy under the abovementioned provisions respectively:—Under sub-s. 1 (*a*), there must be a "conveyance or assignment" in the proper sense of the term, by which the whole or substantially the whole of the debtor's property is vested in a trustee or trustees for the benefit of his creditors generally: other modes of disposition, not properly conveyances or assignments, such as a declaration of trust by the debtor, or a mere agreement by him that his property shall be dealt with for the benefit of creditors, will not suffice. — Under sub-s. 1 (*b*) there must be a conveyance, gift, delivery, or transfer of the debtor's property, or part thereof, with a fraudulent intention.—So held by the Court of Appeal.—Where a debtor retains a solicitor to effect an arrangement with his creditors, and gives authority to the solicitor to sell property belonging to him and apply the proceeds to payment of the solicitor's charges under the retainer, upon the debtor's subsequently becoming bankrupt such solicitor cannot retain proceeds of the property in respect of charges subsequent to knowledge by him of an available act of bankruptcy committed by the debtor.—So held by the Divisional Court.—*In re Sinclair* (15 Q. B. D. 616) discussed and distinguished. In re Spackman. Ex parte Foley - C. A. 728

2. —— *Act of Bankruptcy—Notice of suspension of Payment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*).] In order that a notice given by a debtor to his creditors may be a notice "that he is about to suspend payment of his debts," within the meaning of sub-s. 1 (*h*) of s. 4 of the Bankruptcy Act, 1883, and therefore an act of bankruptcy, it must be an unqualified, unconditional notice from which an ordinary man of business would understand that, if the creditors would not accept less than was due to them, the debtor had no alternative but to suspend payment.—A trader sent the following circular to his creditors: "Being unable to meet my engagements as they fall due, I invite your attendance" [at a specified place and time], "when I will submit a statement of my position for your consideration and decision."—*Held*, by the majority of the Court (Lord Esher, M.R., and Bowen, L.J., Fry, L.J., dissenting), that the circular was a notice that the debtor was "about to suspend payment of his debts," within the meaning of s. 4, sub-s. 1 (*h*).—By Fry, L.J., that the circular was not an unqualified and unconditional notice of an intention to suspend payment, and was

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therefore not such a notice as was contemplated by the section. IN RE CROOK. EX PARTE CROOK [C. A. 320

3. —— *Bankruptcy Petition—Secured Creditor—Obligation to give up or value Security—Company—Debt due from Shareholder—Lien on Shares—Equitable Owner of Shares—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 6, 168.] Upon the hearing of a bankruptcy petition presented by a limited company, it appeared that the debtor had obtained judgment against one of the registered shareholders of the company, declaring that he was a trustee of some of his shares for the debtor. The articles of association of the company provided that the company should "have a first and paramount lien on all shares for all moneys due to the company from the registered holder thereof, or other the persons for the time being entitled thereto as against the company":—*Held*, that, as the company were not bound to recognise trusts of their shares, the debtor was not a person "entitled to the shares as against the company," and, consequently, that they had no lien upon the shares for the debt due to them from him, and were not "secured creditors" of the debtor within the meaning of the Bankruptcy Act, 1883. IN RE PERKINS. EX PARTE MEXICAN SANTA BARBARA MINING COMPANY - C. A. 613

4. —— *Disclaimer—Lease—Onerous Covenants—Assignment of whole Term by way of Mortgage—Bankruptcy of Lessee—Trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.] Where the lessee of premises subject to onerous covenants had before his bankruptcy assigned the premises by way of mortgage for the entire residue of the term:—*Held*, that the trustee in bankruptcy not being liable upon the covenants of the lease either by privity of contract or by privity of estate, the equity of redemption which vested in him was not "property burdened with onerous covenants" within the meaning of s. 55 of the Bankruptcy Act, 1883. IN RE GEE. EX PARTE OFFICIAL RECEIVER - - - 65

5. —— *Conditional Discharge—Judgment Debt—"Conduct and affairs" of Bankrupt—Future prospects of Property—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-ss.* 2, 6.] By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 28 (2), on the hearing of an application for an order of discharge the Court shall take into consideration a report of the official receiver as to the bankrupt's "conduct and affairs," and may grant an absolute order of discharge or "an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property . . ."—By sub-s. 6: "The Court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the official receiver or trustee for any balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the Court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts."—In July, 1885, judgment in an action for breach of promise of marriage was recovered against the bankrupt for 500*l.* damages. In January, 1886, his father died, having by a will, made five days before death, given substantial interests in property which was worth about 3600*l.* to all his children except the bankrupt, to whom a legacy only of 10*l.* payable on the death of his mother was left by the testator. In April, 1889, a receiving order was made against the bankrupt on his own petition. There were practically no assets, and the only creditor was the judgment creditor, who proved for 596*l.*, being the damages, costs, and interest on her judgment debt. Shortly before the petition was filed the family of the bankrupt offered, in satisfaction of her judgment, 250*l.*, which she refused. The county court judge granted to the bankrupt an order of discharge subject to his consenting to a judgment for 250*l.* being entered up against him, such judgment to be deemed to be satisfied if the bankrupt paid to the official receiver 200*l.* within a month:—*Held*, that the facts and circumstances above mentioned were part of the "conduct and affairs" of the bankrupt which could be considered by the Court under s. 28 (2); that they were sufficient to warrant the judge in drawing the inference that the bankrupt would probably come into possession of property in the future, and had presented his petition in order to get rid of his creditor, and enjoy subsequently-acquired property without having to pay any portion of the debt, and that the order was therefore valid. IN RE JONES. EX PARTE JONES [589

6. —— *Practice—Appeal against Receiving Order—Notice to Official Receiver—Bankruptcy Rules*, 1886, *r.* 134—*Rules of Supreme Court*, 1883, *Order LVIII., rr.* 2, 15.] Notice of an appeal against a receiving order, whether to a Divisional Court in Bankruptcy or to the Court of Appeal, must in every case, whether proceedings under the order have or have not been stayed, be served on the official receiver within the time limited by the rules for service on the petitioning creditor. IN RE WEBBER. EX PARTE WEBBER - - - - - C. A. 313

7. —— *Receiving Order—Domicil—Jurisdiction—Debtor having "Dwelling-house" in England—Foreigner Temporarily in England—Debtor having only one Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 1 (*d*).] By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6, sub-s. 1, "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless (inter alia) (*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided, or had a dwelling-house or place of business in England." A domiciled Frenchman came to England for the purposes of an action which he had commenced in the English Courts. He took five furnished rooms on the third and fourth floors of a house in London. He occupied the rooms exclusively for three months from March to June, living in them with his wife and two servants. During the three months he paid frequent visits to France, and at the end of the

BANKRUPTCY—*continued.*

three months returned there. In September of the same year a bankruptcy petition was presented against him in the London Bankruptcy Court:—*Held*, that he had had a dwelling-house in England "within a year before the date of the presentation of the petition," within the meaning of the Act, and that the petition was properly presented against him.—The fact that a debtor against whom a bankruptcy petition has been presented has no other creditor than the petitioning creditor is not a conclusive reason for dismissing the petition, but the Court has a discretion in the matter. In re Hecquard. Ex parte Hecquard - - - C. A. 71

8. —— *Receiving Order—Jurisdiction—Petition presented in wrong Court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52) *ss.* 95, 97—*Bankruptcy Rules*, 1886, *r.* 25.] When a bankruptcy petition has by inadvertence been presented in the wrong Court, that Court has jurisdiction to make a receiving order, and the proceedings can afterwards be transferred to the proper Court.—*Ex parte May* (14 Q. B. D. 37) approved. In re French. Ex parte French - C. A. 63

9. —— *Receiving Order—Jurisdiction—Prior Foreign Bankruptcy—Forum of Domicil—Forum Concursus—Locus standi of Syndic under French Bankruptcy.*] A firm, having its head offices in Paris, had a branch establishment in England. The firm was declared bankrupt in Paris under the law of France, and a syndic was appointed to administer the estate. Subsequently a bankruptcy petition was presented against them in England, and an order was made appointing an interim receiver. The syndic applied to the Court to discharge this order and to stay all further proceedings under the petition. There was no evidence as to the domicil of the members of the firm, but two of them resided in England, where the firm had large assets. The registrar refused the application. On appeal:—*Held*, that the jurisdiction of the Court being undoubted, and there being assets within the jurisdiction, the receiving order was rightly made.—*Held*, further, that the fact that a prior bankruptcy had been commenced in a foreign country, not shewn to be the country of domicil of the debtors, was no ground for staying the proceedings in this country.—*Quære*, whether the syndic had any locus standi to make the application. In re Artola Hermanos. Ex parte André Châle - - - - C. A. 640

10. —— *Practice—Service by Post—Order appointing Time and Place for Bankrupt's Public Examination—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 25, 142—*Bankruptcy Rules*, 1886, *rr.* 92, 185, 186.] Under rule 186 of the Bankruptcy Rules, 1886, which directs that when any order is made appointing the time and place for holding the public examination of a debtor the official receiver "shall serve a copy thereof on the debtor," the copy of such order need not be served personally on the debtor, but may be sent by a prepaid registered letter to the debtor's last known address, according to s. 142 of the Bankruptcy Act, 1883, and rule 92 of the Bankruptcy Rules, 1886. In re McGrath. Ex parte Official Receiver - - - - - 466

11. —— *Service of Bankruptcy Notice or Petition—Substituted Service—Debtor out of Jurisdiction—Bankruptcy Rules*, 1886, *rr.* 141, 153, 154, 156.] Under rule 154 of the Bankruptcy Rules, 1886, an order for substituted service of a bankruptcy notice or petition may be made, notwithstanding that the debtor is out of the jurisdiction, if the Court is satisfied by the evidence that he went out of the jurisdiction in order to avoid service.—*Fry* v. *Moore* (23 Q. B. D. 395) explained and distinguished. In re Urquhart. Ex parte Urquhart - - - - C. A. 72

12. —— *Trustee a Solicitor—Remuneration—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 72, *sub-ss.* 1, 2, *and* 4, *and s.* 73, *sub-s.* 2—*Bankruptcy Rules*, 1886, *rr.* 305, 306.] By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 72, where creditors appoint any person to be trustee of a debtor's estate his remuneration (if any), is to be fixed, if the creditors so resolve, by the committee of inspection, and shall be in the nature of a commission or percentage, one part payable on the amount realized and the other part on the amount distributed in dividend. By s. 73 (2), where the trustee is a solicitor he may contract that the remuneration for his services as trustee shall include all professional services. The creditors of a bankrupt appointed a solicitor the trustee in the bankruptcy "at a remuneration to be fixed by the committee of inspection;" and subsequently the committee passed a resolution that the remuneration of the trustee should be "his proper professional charges as a solicitor for attendance and work done and expenses incurred by him in or about the proceedings in the bankruptcy":—*Held*, that the resolution was invalid inasmuch as it was contrary to s. 72, which required that the remuneration should be a commission or percentage on the amount realized or distributed.—*Semble*, that where the trustee, being a solicitor, contracts, under s. 73 of the Act, with the committee of inspection that his remuneration shall include his professional charges, the proper course is to fix his commission or percentage as trustee under s. 72 at such a rate as will cover his reasonable professional charges. In re Waymar Ex parte Official Receiver - - 6

—— Attachment of debts—Dividend payable by official receiver—"Debt" liable to be attached - - - - 28
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—— Security for costs—Action by undischarged bankrupt—Cause of action arising after bankruptcy - - - - 65
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BILL OF SALE—*Affidavit*—"*Residence*"—*Sufficiency of Description—Business carried on at several Places—Bills of Sale Act*, 1878 (41 & 42 *Vi*

BILL OF SALE—*continued.*

c. 31), *s.* 10.] The grantor of a bill of sale lived and carried on business at A., and had two other places of business. There were goods comprised in the bill of sale at all three places, and the three addresses were stated in the bill of sale. The affidavit filed with the bill of sale stated that the grantor resided at A., but did not mention the other two places of business:—*Held*, that the description of the grantor's residence in the affidavit was sufficient. GREENHAM *v.* CHILD 29

2. —— *Validity—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43)—*Deviation from Form in Schedule—Lump Sum charged by way of Interest—Omission of Descriptions and Addresses of Attesting Witnesses.*] A bill of sale purported to assign the chattels specified in the schedule as security for the payment of a loan of 50*l.* "and interest thereon at the rate of 17*l.* 10*s.* for three years," the grantor covenanting to pay the grantee "the principal sum together with the interest then due in thirty-six equal monthly instalments of 1*l.* 17*s.* 6*d.*," commencing from the date of the instrument. The addresses and descriptions of the attesting witnesses were not stated in the bill of sale, but were stated in the affidavit filed with the registrar under s. 10 of 41 & 42 Vict. c. 31:—*Held*, that the bill of sale was not in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), on the grounds, first, that it did not specify any rate of interest as chargeable for the loan; secondly, that it did not state the addresses and descriptions of the attesting witnesses, and that it was therefore void.—*Myers* v. *Elliott* (16 Q. B. D. 526) followed. *Thorpe* v. *Cregeen* (55 L. J. Q. B. D. 80) and *Wilson* v. *Kirkwood* (48 L. T. 821) disapproved. BLANKENSTEIN *v.* ROBERTSON - - - 543

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BUILDING SOCIETY—*Winding-up—Notice of Withdrawal—Insolvency before Winding-up Order—Effect of Notice of Withdrawal given or maturing after Insolvency, but before Winding-up Order—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 32, *sub-s.* 4.] One of the rules of certain building societies provided as follows: "On and after the expiration of the first twelve months, any member may withdraw the subscription money which he may have contributed, with such an amount of interest as may be determined by the committee, such member to give notice of his intention to withdraw in writing to the secretary, and should more than one member give notice to withdraw at one time, the member so giving

BUILDING SOCIETY—*continued.*

notice shall be paid in rotation, according to the priority of notice, provided always that the said society shall not be required or obliged to make such payment as aforesaid, until they have sufficient funds in hand for that purpose, and also to meet the then existing legal liabilities of the society":—*Held*, that the rule provided only for withdrawal from the societies while they were or were believed to be solvent, and that, therefore, notices of withdrawal, which were given or which matured at a time when the societies were known to be insolvent, though before the actual date of the winding-up order in each case, did not entitle the shareholders who had given them to be paid the amount of their subscriptions in priority to other shareholders in the winding-up:—*Held*, also, that shareholders whose notices of withdrawal had matured before the societies were known to be insolvent, but who had not received the sums due to them, were not, in the absence of a determination by the committee under the rule of the amount due to them in respect of interest, entitled to be allowed interest on those sums in the winding-up till payment.—*Brownlie* v. *Russell* (8 App. Cas. 235) and *Walton* v. *Edge* (10 App. Cas. 33) considered. IN RE SUNDERLAND 36TH UNIVERSAL BUILDING SOCIETY. KING AND CORDNER *v.* RAWLINGS. SUNDERLAND 32ND UNIVERSAL BUILDING SOCIETY. RAWLINGS *v.* OLIVER. SUNDERLAND 36TH UNIVERSAL BUILDING SOCIETY. RAWLINGS *v.* WILKINSON - - - - - 394

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COUNTY—Elector—Nature of occupation whether as householder or by virtue of service
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COUNTY COUNCIL—*Election of—Registration—Elector registered in more than one Division—Right of Voting—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 2, *sub-ss.* (1), (2) (*e*) *and* (4), *s.* 75—*County Electors Act*, 1888 (51 *Vict. c.* 10), *s.* 7, *sub-ss.* (1), (2), (4), *and* (5)—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 44, *sub-s.* (1)—*s.* 45, *sub-s.* (6)—*s.* 51, *sub-s.* (2).] In elections of county councillors under the Local Government Act, 1888, an elector, although duly registered under the County Electors Act, 1888, in more than one electoral division of the same county, is not entitled to vote in more than one electoral division of the same county. KNILL *v.* TOWSE [186

2. —— *Election of—Registration—Elector registered in more than one Division—Right of Voting—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 2, *sub-ss.* (1), (2) (*e*), (4), *and s.* 75—*County Electors Act*, 1888 (51 *Vict. c.* 10), *s.* 7, *sub-ss.* (1), (2), (4), *and* (5)—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 44, *sub-s.* (1), 45, *sub-s.* (5), 51, 59.] In elections of county councillors under the Local Government Act, 1888, an elector, although registered under the County Electors Act, 1888, in more than one electoral division of the same county, is not entitled to vote in more than one electoral division of the same county at the same election. KNILL *v.* TOWSE [C. A. 697

COUNTY COURT—*Jurisdiction—Metropolitan County Court Districts—Administration of Assets of Deceased Person—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 75, 84.] Sect. 75, sub-s. 3, of the County Courts Act, 1888, which provides that proceedings for the administration of the assets of a deceased person are to be taken in the court within the district of which the deceased had his last place of abode in England, or in which the executors or administrators, or any one of them, have their or his place of abode, does not apply to the metropolitan county court districts named in s. 84 of that Act. Where therefore the plaintiff in such proceedings dwells or carries on business in any of such districts, and the defendant dwells or carries on business in any other of such districts, the proceedings may be taken in the court within the district of which either the plaintiff or the defendant dwells or carries on business. THE QUEEN *v.* JUDGE OF BLOOMSBURY COUNTY COURT - - 309

2. —— *Practice—Costs—Plaint entered by Solicitor—Signature of Particulars—County Court Rules*, 1889, *Order* VI., *r.* 10, *and Appendix.*] In order to entitle the plaintiff in an action in a county court to the costs of entering a plaint by a solicitor, the solicitor must sign the particulars, and a lithographed statement of the solicitor's name on the particulars is insufficient. THE QUEEN *v.* COWPER - - - - 60

3. —— *Practice—Costs—Plaint entered by Solicitor—Signature of Particulars—County Court Rules*, 1889, *Order* VI., *r.* 10, *and Appendix.*] In order to entitle the plaintiff in an action in a county court to the costs of entering a plaint by a solicitor, the solicitor must sign the particulars, and a lithographed statement of the solicitor's name on the particulars is insufficient.—So held by Fry, L.J., agreeing with the judgment of the Queen's Bench Division, Lord Esher, M.R., dissenting. THE QUEEN *v.* COWPER - C. A. 533

4. —— *Practice—New Trial—Power of Judge to grant New Trial—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 93.] The power to grant

COUNTY COURT—*continued.*
new trials conferred upon the judges of county courts by s. 93 of the County Courts Act, 1888, is not an absolute power to be exercised upon any grounds which the judge may think fit, but subject to the same limitations as to the grounds on which a new trial may be granted as are imposed upon judges of the Supreme Court. MURTAGH *v.* BARRY - - - - - - 632

—— Power to remit action—Judgment under Order XIV. for part of claim—Reduction of claim to sum not exceeding 100*l.*—"Payment," an admitted set-off or otherwise - - - - - 302
See PRACTICE. 7.

—— Power to remit action—Judgment under Order XIV. for part of claim—Reduction of claim to sum not exceeding 100*l.*—"Payment," an admitted set-off or otherwise - - - - - 525
See PRACTICE. 8.

—— Prohibition—Judge at chambers - 27
See PRACTICE. 22.

CRIMINAL LAW—*Assault—Dismissal of Complaint—Withdrawal of Charge before Hearing—Certificate of Dismissal—Subsequent Action in respect of same Assault*—24 & 25 *Vict. c.* 100, *ss.* 44, 45.] A certificate under 24 & 25 Vict. c. 100, s. 44, of the dismissal by a magistrate of a charge of assault, can only be granted where there has been a hearing "upon the merits," and both parties have attended before the magistrate, and there has been a proper inquiry into the facts of the case. Where, therefore, a prosecutor gave notice to a person against whom he had obtained a summons for an assault, that he should not attend before the magistrate or offer evidence in support of the summons, and did not in fact attend or offer evidence, but the person charged attended and obtained from the magistrate a certificate of dismissal under the above section:—*Held*, that there had not been a hearing upon the merits; that the magistrate had no jurisdiction to grant the certificate; and that the certificate was therefore no bar under s. 45 to a subsequent action in the county court to recover damages in respect of the same assault:—*Held*, further, by Lord Esher, M.R. (Lord Coleridge, C.J., doubting), that upon the trial of the action in the county court the judge had power to inquire into the validity of the certificate, and to consider whether the magistrate in granting it had acted within his jurisdiction. REED *v.* NUTT - 669

2. —— *Conspiracy to procure Abortion—Woman not with Child—Liability for Conspiracy*—24 & 25 *Vict. c.* 100, *s.* 58.] A woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion. THE QUEEN *v.* WHITCHURCH - - C. C. R. 420

3. —— *Larceny—Post Office—Causing Postman to intercept Letter—Liability as Principal or Accessory*—24 & 25 *Vict. c.* 94, *s.* 1.] A person who induces a servant of the Post Office to intercept and hand over a letter, which is in course of transmission by the post, is either guilty of larceny as a principal felon, or is accessory before the fact to the larceny committed by the servant of the Post Office, and in either view can be convicted on an indictment charging him with larceny of the letter. THE QUEEN *v.* JAMES [C. C. R. 439

4. —— *Practice—Previous Conviction—Summary Conviction for Assault—Subsequent Indictment for same Assault*—24 & 25 *Vict. c.* 100, *ss.* 44, 45—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 16.] A person who has been convicted of an assault by a court of summary jurisdiction, but has been discharged, without any sentence of fine or imprisonment, on giving security to be of good behaviour, cannot afterwards be convicted on an indictment for the same assault. THE QUEEN *v.* MILES - C. C. R. 423

5. —— *Prosecution—Vexatious Indictments Act* (22 & 23 *Vict. c.* 17)—*Refusal by Justice to commit—Bill preferred—Intervention of Public Prosecutor—Acquittal—Liability for Costs*—30 & 31 *Vict. c.* 35, *s.* 2; 42 & 43 *Vict. c.* 22, *s.* 7.] By 30 & 31 Vict. c. 35, s. 2, whenever any bill of indictment shall be preferred under the Vexatious Indictments Act (22 & 23 Vict. c. 17), against any person who has not been committed . . . . to answer such indictment and the person accused thereby shall be acquitted thereon, it shall be lawful for the Court before which such indictment shall be tried, in its discretion, to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred, shall pay to the accused person his costs to be taxed.—By the Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22), s. 7, where any criminal proceeding is instituted, undertaken, or carried on by the director of public prosecutions, such director shall not be bound over to prosecute or conduct such proceeding, or required to give security for costs, and it shall not be necessary to bind over any person to prosecute or conduct such proceeding, and if any person is so bound over, or has given security for costs, he shall, upon the director of public prosecutions undertaking the case, be released from such obligation, and the security shall be deemed to have been cancelled, "and the director of public prosecutions shall be liable to costs in lieu of such person."—A charge of conspiracy was made before a magistrate, who refused to commit the persons charged. The prosecutor thereupon entered into his recognizances under 22 & 23 Vict. c. 17, and preferred an indictment against the defendants, which was found by the grand jury. The director of public prosecutions then undertook the prosecution. The defendants were tried and acquitted, and the Court ordered the public prosecutor to pay the costs. The original prosecutor had given no security for costs:—*Held*, that s. 7 of 42 & 43 Vict. c. 22, imposed no greater liability on the director of public prosecutions than that from which the original prosecutor was relieved, viz., the costs for which he was liable under his security, and that the order was therefore invalid. STUBBS *v.* DIRECTOR OF PUBLIC PROSECUTIONS 577

6. —— *Attempt to commit Unnatural Offence—Domestic Fowls—Question of Law arising on the Trial—Jurisdiction of Court for Crown Cases*

CRIMINAL LAW—*continued.*
Reserved—11 & 12 *Vict. c.* 78, *s.* 1—24 & 25 *Vict. c.* 100, *s.* 61.] The prisoner pleaded guilty at assizes to an indictment charging him with having attempted to commit unnatural offences with domestic fowls, and was sentenced to a term of imprisonment. After the judge left the assize town his attention was called to an unreported case which was said to have decided that a duck was not an "animal" within the meaning of 24 & 25 Vict. c. 100, s. 61, and he thereupon stated a case, requesting the opinion of the Court for Crown Cases Reserved whether the conviction was good:—*Held*, that the objection to the indictment was a question which had arisen at the trial so as to give the Court for Crown Cases Reserved jurisdiction, under 11 & 12 Vict. c. 78, s. 1, to entertain the case.—*Held*, also, that the indictment was good, and that the prisoner was properly convicted.—*Reg.* v. *Collins* (L. & C. 471; 33 L. J. M. C. 177) and *Reg.* v. *Dodd* (decided in 1877 and unreported) overruled.—*Reg.* v. *Clark* (Law Rep. 1 C. C. R. 54) discussed and distinguished. REG. *v.* BROWN - - C. C. R. 357

CROWN—Weights and measures—False weights—Property of General Post Office 181
See WEIGHTS AND MEASURES.

DAMAGES—Action for libel—Excessive damages—New trial - - - - 53
See PRACTICE. 19.

DEFAMATION—Excessive damages—Action for libel—New trial - - - 53
See PRACTICE. 19.

—— Pleading—Matter in aggravation of damages
See PRACTICE. [630

DEMURRAGE — Bill of loading — Evidence of contract by consignee under bill of lading to be liable for demurrage incurred at port of loading - - 158
See SHIP. 2.

—— Charterparty—Lay days—Arrival at place of loading - - - - 152
See SHIP. 3.

DESCRIPTION—Bill of sale—Residence—Business carried on at several places - 29
See BILL OF SALE.

DISCHARGE — Bankruptcy — Conditional discharge — "Conduct and affairs" of bankrupt - - - - 589
See BANKRUPTCY. 5.

DISCLAIMER — Lease — Onerous covenants — Assignment of whole term by way of mortgage - - - - 65
See BANKRUPTCY. 4.

DISCOVERY — Affidavit of documents — Document not disclosed in—Inspection 537
See PRACTICE. 12.

—— Affidavit of documents—Documents not disclosed in - - - - 626
See PRACTICE. 13.

—— Interrogatories to town clerk of corporation—Solicitor—Privilege - - 695
See PRACTICE. 10.

DISTRESS—Agricultural Holdings Act, 1883—Bailiffs' fees on levy - - - 17
See LANDLORD AND TENANT. 2.

—— Removal of goods to prevent distress—Bill of sale—Seizure by grantee—Action for double value - - - 135
See LANDLORD AND TENANT. 3.

DOMICIL—Bankruptcy—Debtor having dwelling-house in England - - 71
See BANKRUPTCY. 7.

"**DWELLING-HOUSE**" — Occupation as tenant or by service - - - 147
See PARLIAMENT.

—— Successive occupation as servant and householder - - - - 145
See PARLIAMENT. 4.

EASEMENT—Compensation—Purchase of land—Inchoate rights or easements extinguished - - - - 381
See ARTIZANS AND LABOURERS DWELLINGS IMPROVEMENT ACT.

ECCLESIASTICAL LAW—*Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85), *s.* 9—*Bishop's Discretion to stop Proceedings on Representation—"After considering the whole circumstances of the case"—Refusal or Excess of Jurisdiction—Mandamus.*] By s. 9 of the Public Worship Regulation Act, 1874, it is provided, where a representation has, under s. 8, been sent to the bishop of the diocese complaining of an unlawful alteration in or addition to the fabric, ornaments, or furniture of a cathedral church, that he shall take certain specified steps to have the matter of the complaint tried in one of the ways prescribed by the Act, "unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, in which case he shall state in writing the reason for his opinion, &c."—A representation was sent to the Bishop of London complaining that the Dean and Chapter of St. Paul's Cathedral Church had set up on a reredos in that church a figure, five feet in height, of our Lord upon the Cross, in a conspicuous position immediately above the communion table, so as to have the appearance of an altar crucifix; and a figure, five feet six inches in height, of the Virgin with the Child in her arms, in a conspicuous position above the figure of our Lord; and that each of such figures tended to encourage ideas and devotions of an unauthorized and superstitious kind, and was unlawful. The bishop replied that, having in pursuance of the statute considered the whole circumstances attending the representation, he was of opinion that proceedings should not be taken; stating in substance as his reasons that the main question of principle at issue had been already decided in *Phillpotts* v. *Boyd* (Law Rep. 6 P. C. 435), in which a reredos, shewing a figure of our Lord in the act of ascending into heaven, in a conspicuous position immediately above the communion table, was held to be lawful: that it appeared impossible to say that the difference between the two erections was of very grave importance, or that one offered serious temptations to idolatry and the other did not: that litigation in such matters, even where

ECCLESIASTICAL LAW—*continued.*
necessary in order to settle disputed matters of grave importance, was a necessary evil, keeping up irritation and party strife, embittering men's feelings, inflicting much mischief on the Church and true religion, and only tolerable as a preventive of worse mischief which would otherwise follow; and he was satisfied that, in the present instance, the proceedings could not end in any result which would make up to the Church and to the religious life of the country for the mischief which would be inflicted upon them by the litigation itself.—On an application by the complainants for a mandamus to compel the bishop to act in furtherance of the proceedings as prescribed by the statute:—*Held* (reversing the judgment of the Queen's Bench Division), that it did not appear that the bishop had either declined the jurisdiction given him by the Act by refusing to consider the circumstances of the case, or exceeded such jurisdiction by considering matters which were not circumstances of the case, and therefore no grounds were shewn for issuing a mandamus. THE QUEEN *v.* THE BISHOP OF LONDON - - - - C. A. 213

ELECTION—County council—Elector registered in more than one division—Right of voting - - - - 186
See COUNTY COUNCIL. 1.

—— County council—Elector registered in more than one division—Right of voting 697
See COUNTY COUNCIL. 2.

—— Petition—Municipal election—Report of commissioner—Jurisdiction of High Court - - - - 110
See MUNICIPAL ELECTION.

EMPLOYERS LIABILITY ACT, 1880, s. 1, sub-s. 3—Master and servant - 568
See NEGLIGENCE.

ESTOPPEL—Bailment—Jus tertii—Interrogatories - - - - 573
See BAILMENT.

—— Shares—Transfer of—Notice to holder of stock on register - - - 77
See COMPANY.

EXCISE—Hackney carriage—Omnibus - 172
See REVENUE. 2.

EXECUTION—Sheriff—Withdrawal of execution—Liability of execution creditor—Taxation of fees—Appeal - - 621
See SHERIFF.

EXECUTOR AND ADMINISTRATOR—*Plene Administravit—Conflict of Law and Equity—Judicature Act*, 1873, *s.* 25, *sub-s.* 11—*Action brought, Payment of another Creditor after—Judgment avoided by Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 27, *Effect of.*] An executor or administrator is entitled, after action brought against him by a creditor of the deceased for his debt, to apply the assets in payment of the debt of another creditor, inasmuch as, the rules of law and equity on the subject having been in conflict, the equity rule must now prevail.—*In re Radcliffe* (7 Ch. D. 733) followed.—The defendant, an administratrix, after action brought against her for money lent to the intestate by the plaintiff, consented to a judge's order for judgment in a subsequent action by another creditor for a debt due from the intestate, and judgment was signed accordingly. The judgment was void as against creditors, though not as between the parties, because the judge's order was not filed as required by the Debtors Act, 1869, s. 27. The defendant having paid the amount of that debt which exhausted the assets:—*Held*, that, as between her and the plaintiff, the original debt was not merged in the judgment, and that she was entitled to make the payment in respect of such debt. VIBART *v.* COLES [C. A. 364

EXECUTOR AND ADMINISTRATOR—*contd.*
—— Shares, transmission of, in consequence of death—Transfer of shares by one of two executors - - - - 77
See COMPANY.

FRAUD—Offence of selling goods to which a false trade description is applied—Intent to defraud purchaser - - 162
See TRADE MARK. 2.

FRIENDLY SOCIETY—*Illegal Rules—Restraint of Trade—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *ss.* 2, 3, 4, 23—*Trade Union Act Amendment Act*, 1876 (39 & 40 *Vict. c.* 22), *s.* 16.] Where the general objects of a society are legal, as in the case of a provident society the object of which is the relief of members when disabled by age or accident or when out of employment, the fact that some of its rules are illegal as being in restraint of trade does not constitute the society an illegal society, or prevent a member from recovering a sum of money payable to him under a rule of the society which is not illegal.—Rules made for the bonâ fide purpose of protecting the funds of such a society from claims, which may be avoided, are not illegal because they are incidentally to some extent in restraint of trade, provided that their provisions go no further than is reasonable and necessary for that purpose. SWAINE *v.* WILSON [C. A. 252

GAME—Allotment—Reservation of exclusive right of shooting to lord of manor 468
See INCLOSURE ACT.

—— Licensing Acts—Licence to deal in game—Disqualification—Sale of beer by retail
See LICENSING ACTS. 3. [346

GAMING—*Suffering House to be used in contravention of the Betting Houses Act* (16 & 17 *Vict. c.* 119), *ss.* 1, 3—*Use of House for the purpose of the receipt of Money by way of Betting—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 17.] By s. 17 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), any licensed person who suffers his house to be used in contravention of the Betting Houses Act (16 & 17 Vict. c. 119) is liable to a penalty. By ss. 1 and 3 of the Betting Houses Act (16 & 17 Vict. c. 119), any occupier of a house who permits it to be used by another for the purpose of any money being received by or on behalf of such person by way of betting is guilty of an offence.—The defendant, the keeper of a licensed house, allowed a person who made bets near it to deposit in the house the stakes received by him. Such stakes had been received by him outside the

GAMING—*continued.*
house.—*Held*, that, as the money was proved to have been received by the depositor outside and not inside the house, the defendant was not liable to be convicted for suffering the house to be used by the depositor for the purpose of money being received by him by way of betting contrary to ss. 1 and 3 of the Betting Houses Act (16 & 17 Vict. c. 119). DAVIS *v.* STEPHENSON - 529

GARNISHEE—Attachment of debts—Administration in bankruptcy of estate of person dying insolvent—Dividend payable by official receiver - - - 281
See PRACTICE. 3.

—— Order—Married woman - - 103
See HUSBAND AND WIFE.

—— Solicitor—Dealings with client—Purchase of subject-matter of suit - - 519
See SOLICITOR.

HABEAS CORPUS—*Issue of Writ against Person who has no longer Custody of Person detained—Illegal handing over of Person detained—Evasion of Process—Impossibility of obeying Writ.*] On an application by the parent for a writ of habeas corpus in respect of a child, directed to the head of an institution for destitute children, in which the child had been placed, it appeared that before the proceedings commenced he had, without authority from the parent, handed over the child to another person to be taken to Canada, and that he did not know the address of such person or where he or the child was:—*Held*, that the writ should issue:—By Lord Esher, M.R., on the ground that, although it might be that the writ ought not to issue, if it were shewn to be absolutely impossible to produce the child, the facts of the case did not shew such impossibility, and the person against whom the application was made, having illegally parted with the custody of the child, still continued responsible for its production:—By Fry, L.J., on the ground that, although the general scope of the writ of habeas corpus is to compel production of a person detained by a person in whose custody he is detained, and the writ ought not to issue where it appears to be impossible that it should be obeyed, yet it ought to issue where the circumstances lead to the conclusion that the person against whom the application for the writ is made has handed over the custody of the person detained for the purpose of evading the process of the Court, and that, if the writ be issued against him, the person detained may be produced; and that the circumstances of the case did point to such conclusion.—*Reg.* v. *Barnardo* (23 Q. B. D. 305) discussed. THE QUEEN *v.* BARNARDO - - - C. A. 283

HACKNEY CARRIAGE—Excise—Omnibus 172
See REVENUE. 2.

HIGHWAY—"Street"—Sewering and paving—Additions to ancient highway - 264
See LOCAL GOVERNMENT. 5.

HUSBAND AND WIFE—*Married Woman—Attachment of Debts—Order XLV., r.* 1.] Judgment having been signed in an action against a married woman, execution upon which was limited to her separate estate not subject to any restraint upon anticipation, it was sought to attach in

HUSBAND AND WIFE—*continued.*
execution a sum of money recovered by her as damages in an action against the garnishee, and for which the judge at the trial had directed judgment to be entered for her:—*Held*, that the money could be attached.—*Held*, further, that the fact that judgment in the action against the garnishee was not in fact entered until after the commencement of the garnishee proceedings did not affect the right of the plaintiff to a garnishee order. HOLTBY *v.* HODGSON - - C. A. 103

2. —— *Married Woman—Contract—Separate Estate—Restraint on Anticipation—Intention to bind — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 3.] In an action against a married woman to recover the price of goods sold and delivered to her it appeared that upon her marriage certain property had been settled upon her to her separate use with a restraint upon anticipation, the income of which she spent in the purchase of clothes for herself and her children, and that at the date of her contract with the plaintiffs she had no separate property free from restraint upon anticipation other than the clothes so purchased:—*Held*, that the test of her liability was the possession by her at the date of the contract of free separate property with respect to which she might reasonably be deemed to have contracted; that she could not reasonably be deemed to have contracted with respect to the clothes of herself and her children, and that the plaintiffs were therefore not entitled to recover. LEAK *v.* DRIFFIELD - - 98

ILLEGAL CONTRACT—*Partial Performance—Bar to Action for Money paid.*] Where money is paid under an illegal contract which has been partially carried into effect, the money cannot be recovered back.—The defendants were solicitors to the petitioning creditor in certain bankruptcy proceedings, and had incurred costs which were to be paid out of the estate. The plaintiff, a friend of the bankrupt, offered to pay to the defendants a sum of money for these costs, which had not been paid owing to want of assets, on their undertaking not to appear at the public examination of the bankrupt, and not to oppose his order of discharge. The defendants, with the consent of their client, agreed to this, and received the money. They did not appear at the public examination of the bankrupt, and, before any application for his discharge had been made, the plaintiff brought an action to recover back the money from the defendants:—*Held*, that, though the contract was illegal, the partial performance of it prevented the plaintiff from recovering back the money paid under it. KEARLEY *v.* THOMSON AND ANOTHER - - C. A. 742

ILLEGALITY—Friendly society—Illegal rules—Restraint of trade - - - 252
See FRIENDLY SOCIETY.

INCLOSURE ACT—*Game—Reservation of Exclusive Right of Shooting to Lord of Manor—Construction.*] By a private Inclosure Act an allotment was directed of certain waste lands, the mines, &c., under the allotments being reserved to the lord; the allotments were declared to be the freehold of the allottees to all intents and

INCLOSURE ACT—*continued.*
purposes whatsoever. The reservation clause provided that nothing in the Act contained should prejudice the right, title, or interest of the lord of the manor, his heirs and assigns, of, in, or to the coal, &c., under the allotments, or of, in, or to the seigniories and royalties, franchises, and liberties, incident and belonging to the manor; but that he might have, hold, take, and enjoy "all rents, services, courts, &c., piscaries, fishing, hunting, hawking and fowling, &c., and all other royalties, liberties, franchises, privileges, pre-eminences, jurisdictions, and appurtenances whatsoever to the said barony and manors or to the lord or lady thereof for the time being incident, appertaining or belonging, or which have been anciently used, exercised, and enjoyed by the lord or lady of the same barony or manors (other than and except such right of common, pasturage, and free warren in respect of conies, which is intended to be extinguished) as could or might be claimed by him, her, or them as owner of the soil of the said moors, commons, and waste grounds, in as full, ample, and beneficial manner as he could or might have held and enjoyed the same in case this Act had not been made." The clause then dealt with the reservation of minerals and gave all necessary wayleaves and powers of search and working to the lord. It did not appear whether before the Act there was a general right of free warren in the lord:—*Held*, that the Act did not confer on or reserve to the lord an exclusive right of shooting game over the allotments.—A right of shooting game over allotments declared by an Inclosure Act to be the freehold of the allottees can only be reserved to the lord in express terms or by necessary implication.—*Sowerby* v. *Smith* (Law Rep. 9 C. P. 524) approved and followed.—*Lord Leconfield* v. *Dixon* (Law Rep. 3 Ex. 30) commented on. Duke of Devonshire *v.* O'Connor - - - **C. A. 468**

INCOME TAX—Annuities payable out of profits or gains—Assessment of profits or gains
See Revenue. 3. [500

—— Deduction on life insurance — Insurance company abroad - - - **491**
See Revenue. 5.

—— Foreign loan — Annuity — Application of balance to repayment - - **548**
See Revenue. 4.

—— Manor—"Profits"—Cost of collection—Deduction - - - - **485**
See Revenue. 6.

INDICTMENT — Previous conviction — Summary conviction for assault—Subsequent indictment for same assault - - **423**
See Criminal Law. 4.

INFANT — *Contract—Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 1.] By s. 1 of the Infants' Relief Act, 1874, "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or

INFANT—*continued.*
by the rules of common law or equity, enter, except such as now by law are voidable."—The plaintiff, an infant, agreed with the defendant to become tenant of a house, and to pay a certain sum for the furniture therein. The plaintiff paid the defendant part of this sum and occupied the house, and used the furniture during several months:—*Held*, that the plaintiff was not entitled under the section to recover back the amount paid by him to the defendant. Valentini *v.* Canali - - - - - - **166**

—— Discovery—Interrogatories - - **361**
See Practice. 11.

INFORMATION—Conviction—Alternative statement of offence—Insufficiency of statement - - - - - **634**
See Justices.

INN—Conviction of felony—Queen's pardon—Effect of - - - - **561**
See Licensing Acts.

—— Licensing Acts—Neglect of outgoing tenant to apply for renewal—Refusal to grant licence to incoming tenant—Right of appeal to quarter sessions - **132**
See Licensing Acts. 2.

—— Licensing Acts—Provisional licence—Premises "about to be constructed"—Renewal—Appeal against refusal to renew - - - - - **341**
See Licensing Acts. 4.

INSPECTION — Affidavit of documents — Document not disclosed in - - **537**
See Practice. 12.

—— Affidavit of documents—Documents not disclosed in - - - - **626**
See Practice. 13.

INSURANCE, LIFE—Income tax—Deduction of premium—Foreign company - **491**
See Revenue. 5.

INSURANCE, MARINE—*Mutual Insurance Society—Construction of Rules—Lloyd's Policy—Running Down Clause—Loss not covered—Collision—Adjustment of Damage—Money which the Insured "shall become liable to pay."*] The plaintiffs, a mutual marine insurance association, insured the defendants' ship against loss or damage to any other vessel, so far as not covered by Lloyd's policies with running down clause attached. The defendants' ship was insured by a Lloyd's policy, with a running down clause by which, if the ship insured should come into collision with any other ship, and the insured should in consequence become liable to pay, and should pay, any sum not exceeding the value of the vessel insured, the insurers undertook to pay to the insured such proportion of three-fourths of the sum so paid as their respective subscriptions bore to the value of the ship.—While so insured the defendants' ship came into collision with another ship. Both ships received damage, but the damage to the defendants' ship exceeded that to the other. Both ships were to blame, and the owners of the other ship paid to the defendants the difference between half the amount of the damage to the other ship and half the amount of the damage to the defendants' ship.—The

INSURANCE, MARINE—*continued.*
defendants claimed to set off against a claim for money received to the plaintiffs' use a sum which was in their hands, on the ground that it was due to them as the plaintiffs' proportion of the damage done to the other ship in the collision, for which the defendants were liable, and which was not covered by the Lloyd's policy with running down clause attached:—*Held*, that as half the amount of the damage to the other ship had not been paid over by the defendants to the owners of the other ship, but had only been allowed in account, by being deducted from the amount of half the damage to the defendants' ship, therefore half the amount of the damage to the other ship was not a sum which the defendants had become liable to pay, and had paid, within the meaning of the running down clause, and, therefore, was not recoverable by the defendants from the plaintiffs as loss or damage not covered by the Lloyd's policy with running down clause attached. London Steamship Owners' Insurance Company *v.* Grampian Steamship Company - - - - 32

2. —— *Running Down Clause—Collision—Insurance against Sum paid by Assured for Damage to other Ship—Liability of Shipowner when both Ships to blame.*] Where there is a collision between two vessels, by which one of them is more damaged than the other, and, both being to blame, they have to share the damage equally, there is not a cross liability on the part of each vessel to pay half of the damage sustained by the other, but one liability only, viz., the liability of the vessel less damaged to pay to the vessel more damaged one half of the amount by which the damage to the one exceeds the damage to the other.—Therefore the owner of the more damaged vessel in such a case is not entitled to recover upon an insurance effected by him against liability for damage to another vessel by collision with his vessel:—So *held* by the Court of Appeal, affirming the judgment of the Queen's Bench Division. The London Steamship Owners' Insurance Company *v.* The Grampian Steamship Company - - - - C. A. 663

INTERNATIONAL LAW—*Ambassador, Privilege of—Secretary of Embassy—British Subject accredited by Foreign Government to Great Britain.*] A British subject, accredited to Great Britain by a foreign government as a member of its embassy, is, unless he has been received by the British government upon the express condition that he shall be subject thereto, exempt from the local jurisdiction of his own country, and therefore, where this condition has not been imposed on him at the time of his reception, his household furniture is privileged from seizure for non-payment of parochial rates. Macartney *v.* Garbutt [368

INTERPLEADER—Chose in action—Shares—Certificate and transfer - - 275
See Practice. 16.

—— Equity of redemption—Bill of sale—Prior mortgage - - - - 272
See Practice. 15.

—— Wharfage charges - - - 750
See Practice. 14.

INTERROGATORIES—Action for libel—Payment into Court—Sufficiency of answer
See Practice. 17. [441

—— Bailment—Jus tertii - - - 573
See Bailment.

—— Deposit—Discretion of judge - - 454
See Practice. 9.

—— Infant—Discovery - - - 361
See Practice. 11.

—— Objection to answering—Order striking out interrogatories - - - 727
See Practice. 18.

—— Town clerk of corporation—Solicitor—Privilege - - - - 695
See Practice. 10.

JOINT TENANCY—Application to register transfer of stock in joint names of a corporation and an individual - - 406
See Banker.

JUDGMENT, SUMMONS FOR—Application made after delivery of defence—Jurisdiction to make order - - - 504
See Practice. 20.

JURISDICTION—Ambassador, privilege of—British subject accredited by foreign government to Great Britain - 368
See International Law.

—— Bankruptcy—Debtor having "dwelling-house" in England—Foreigner temporarily in England - - - 71
See Bankruptcy. 7.

—— Bankruptcy—Petition presented in wrong Court—Receiving order - - 63
See Bankruptcy. 8.

—— Court for Crown Cases Reserved—Question of law arising on trial - - 357
See Criminal Law. 6.

—— Railway and Canal Commission - 456
See Railway and Canal Commission.

JUS TERTII—Bailment—Estoppel—Interrogatories - - - - 573
See Bailment.

JUSTICES—*Practice—Information—Conviction—Alternative Statement of Offence—Insufficiency of Statement.*] Where a statute or bye-law creates two distinct offences, and provides the same penalty for both, an information and conviction stating the offence in the alternative, as contrary to the statute (or bye-law), are insufficient.—Therefore, where a bye-law provided that "no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public," and the penalty was the same whichever class of persons had ground of complaint, and an information and conviction stated that the defendant permitted smoke to escape contrary to the bye-law, without stating in terms any reasonable ground of complaint to the passengers or the public, or either of them:—*Held*, that such statement was insufficient, and the conviction must be quashed. Cotterill *v.* Lempriere - - - - - 634

LAND CHARGES REGISTRATION — *Charges under Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 257—*Registration—Land Charges Registration and Searches Act*, 1888 (51 & 52 *Vict. c.* 51), *ss.* 4 *and* 10.] By s. 257 of the Public Health Act, 1875, certain expenses incurred by local authorities, for the payment of which the owner of the premises in respect of which they were incurred is liable, may be recovered from the owner, and until recovery are a charge upon such premises:—*Held*, that such expenses are not "land charges" within the meaning of the Land Charges Registration and Searches Act, 1888, so as to require registration under that Act. The Queen *v.* Vice-Registrar of Office of Land Registry - - - - - 178

LANDLORD AND TENANT—*Compensation for Improvements—Time for giving Notice of Claim—Tenant holding over—Custom of the Country—Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 7.] By s. 7 of the Agricultural Holdings Act, 1883, "a tenant claiming compensation under this Act shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim."—Where the tenant of a farm was entitled, under the custom of the country, to hold over a portion of the land for four months after the expiration of his notice to quit the farm:—*Held*, that the "determination of the tenancy" took place when the tenant's holding under the custom of the country ended; and therefore that a notice of his claim for compensation, given two months before that time, was good. *In re* Paul. *Ex parte* Earl of Portarlington - - 247

2. —— *Distress for Rent—Percentage for levying Distress—Bailiff's Fee for Levy — Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 49, *Sched.* 2.] In distress for rent under the Agricultural Holdings Act, 1883, the bailiff and not the landlord is entitled to the percentage for levying distress authorized by sched. 2 of that Act.—*Coode* v. *Johns* (17 Q. B. D. 714) overruled. Phillips *v.* Rees - - - C. A. 17

3. —— *Removal of Goods to prevent Distress—Action for Double Value*—11 *Geo.* 2. *c.* 19, *ss.* 1, 3—*Bill of Sale—Seizure by Grantee—Removal of Goods before expiration of five clear days—Consent of Grantor—Rights of Landlord—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 13.] The statute 11 Geo. 2, c. 19, s. 3, which gives to landlords a right of action to recover double the value of goods fraudulently carried off the premises to avoid a distress, applies to the goods of the tenant only, and not to those of a stranger.—The provision in s. 13 of the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), that all chattels seized under a bill of sale shall remain on the premises where they were so seized for five clear days after seizure is for the benefit of grantors.—Where, therefore, a tenant of the plaintiff had given the defendants a bill of sale over his furniture, and the defendants seized the furniture under their bill of sale, and within five days removed it by the authority of the tenant, with the intention of preventing the plaintiff from distraining for rent then due:—*Held*, that, the furniture being the property of the defendants as grantees of the bill of sale, an action for double value under 11 Geo. 2, c. 19, s. 3, would not lie against them:—*Held*, also, that the plaintiff had no cause of action in respect of the removal of the goods by the defendants within five days after the seizure under the bill of sale.—*Lane* v. *Tyler* (56 L. J. (Q. B. D.) 461) approved. Tomlinson *v.* The Consolidated Credit and Mortgage Corporation C. A. 135

—— Bankruptcy—Disclaimer—Lease — Onerous covenants—Assignment of whole term by way of mortgage - - 65
See Bankruptcy. 4.

LANDS CLAUSES ACT, 1845—8 & 9 *Vict. c.* 18, *s.* 68—*Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 16—*Land injuriously affected—Obstruction of Lights—Compensation, Measure of—Damages recoverable in an Action.*] The claimant being the owner of certain buildings with ancient lights, pulled them down and erected a new building on their site. The position of certain portions of the windows of the new building coincided with that of portions of the old windows, while other portions of the new windows occupied wholly different positions. Before any right to the access of light to the non-coinciding portions of the new windows had been acquired, a railway company in the exercise of their powers erected a warehouse which obstructed the lights of windows in the new building:—*Held*, that the claimant was entitled to compensation in respect of the whole of the windows so obstructed, including the windows and portions of windows which did not coincide with any of the ancient lights. *In re* London, Tilbury and Southend Railway Company and Trustees of the Gower's Walk Schools - - - 40

2. —— *Compensation—Obstruction of Lights—Land injuriously affected — Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 16—*Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 63, 68.] The claimants, being the owners of certain buildings with ancient lights, pulled them down and erected a new building on their site. The position of certain portions of the windows of the new building coincided with that of portions of the old windows, while other portions of the new windows occupied wholly different positions. Before any right to the access of light to the non-coinciding portions of the new windows had been acquired, a railway company, in the exercise of their powers, erected a warehouse which obstructed the lights of windows in the new building:—*Held* (affirming the judgment of the Queen's Bench Division) that the claimants were entitled to compensation in respect of the whole of the windows so obstructed, including the windows and portions of windows which did not coincide with any of the ancient lights. *In re* London, Tilbury and Southend Railway Company and Trustees of Gower's Walk Schools [C. A. 326

LARCENY—Post Office — Causing postman to intercept — Liability as principal or accessory - - - - 439
See Criminal Law. 3.

LIBEL—New trial—Excessive damages - 53
See Practice. 19.

—— Pleading—Matter in aggravation of damages
See Practice. 21. [630

LICENSING ACTS—*Inn—Conviction for Felony—Queen's Pardon—Effect of*—33 & 34 *Vict. c.* 29, *s.* 14.] By 33 & 34 Vict. c. 29, s. 14: "Every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid. . . ."—Upon an application for a licence to sell spirits by retail, it appeared that the applicant had been convicted of felony but had received a free pardon under the Royal Sign-manual:—*Held*, that the disqualification imposed on him by s. 14 was removed by the pardon, and that the licence might be granted to him. HAY *v.* JUSTICES OF TOWER DIVISION OF LONDON **561**

2. —— *Inn—Neglect of outgoing Tenant to apply for Renewal—Refusal to grant Licence to incoming Tenant—Right of Appeal to Quarter Sessions—Intoxicating Liquors Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 4, 14, 27—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 74, 75, *Sched.* 2.] By s. 75 and sched. 2 of the Licensing Act, 1872, ss. 27, 28, and 29 of the Licensing Act, 1828, which gave a right of appeal to quarter sessions to any person aggrieved by any act of justices done in the execution of that Act, are repealed, except so far as they relate to "the renewal of licences or to the transfer of licences under ss. 4 and 14 of the same Act."—The outgoing tenant of a licensed house wilfully refused or neglected to apply for a renewal of the licence, and left the house on the day of the last adjournment of the general annual licensing meeting. The new tenant applied at a special sessions for the grant to himself of a licence under s. 14 of the Licensing Act, 1828; but his application was refused. An appeal to quarter sessions was dismissed upon the ground that the application to justices was not an application for the renewal or transfer of a licence under ss. 4 and 14 of the Licensing Act, 1828, and that the right of appeal had, therefore, been taken away by s. 75 and sched. 2 of the Licensing Act, 1872:—*Held*, that the quarter sessions were wrong; that the application was one for a renewal or transfer of a licence under ss. 4 and 14 of the Licensing Act, 1828, and that the right of appeal was, therefore, preserved by the exception contained in sched. 2 of the Licensing Act, 1872 THORNTON *v.* CLEGG - - - - **132**

3. —— *License to Deal in Game—Disqualification—Sale of Beer by Retail—Additional Licence for Sale of Beer*—1 & 2 *Wm.* 4, *c.* 32, *s.* 18—4 & 5 *Wm.* 4, *c.* 85, *s.* 19—26 & 27 *Vict. c.* 33, *s.* 1.] The holder of an additional licence to sell beer under 26 & 27 Vict. c. 33, s. 1, is a person "licensed to sell beer by retail" within the meaning of s. 18 of the Game Act, 1831 (1 & 2 Wm. 4, c. 32), and is therefore disqualified from holding a licence to deal in game under that section. SHOOLBRED & CO. *v.* JUSTICES OF ST. PANCRAS - - - - - **346**

4. —— *Provisional Licence—Premises "about to be constructed"—Renewal—Appeal against refusal to renew—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 22—*Licensing Act*, 1828, 9 *Geo.* 4, *c.* 61, *s.* 27.] By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 22, where premises are about to be constructed for the purpose of being used for the sale of intoxicating liquors to be consumed on the

LICENSING ACTS—*continued.*

premises, the licensing justices, if satisfied with the plans of such premises submitted to them, may make a provisional grant of a licence in respect of such premises, such grant to be of no validity until declared to be final by an order of the licensing justices. The provisional grant of a licence shall be subject to the same conditions as to the giving of notices and generally as to procedure as if such grant were not provisional, &c.:—*Held*, first, that a provisional licence granted under s. 22 is capable of renewal, and may be renewed although the premises have been completed, and an application to the justices for an order declaring the licence final has been made and refused; secondly, that an appeal lies to quarter sessions against the refusal of the justices to renew such provisional licence. REG. *v.* THE JUSTICES OF THE COUNTY OF LONDON **341**

5. —— *Sale of Beer by Retail—Excise Licence to sell Beer in Wholesale Quantities—Sale of prescribed Quantity in pint Bottles*—6 *Geo.* 4, *c.* 81, *s.* 2—4 & 5 *Wm.* 4, *c.* 85, *s.* 19—26 & 27 *Vict. c.* 33, *s.* 1—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 74.] The appellant held an excise licence under 6 Geo. 4, c. 81, s. 2, for the sale of beer in casks containing not less than four and a half gallons or in not less than two dozen reputed quart bottles at one time; he did not hold a licence under 26 & 27 Vict. c. 33, s. 1, which enables the holder of such an excise licence to take out an additional licence for the sale of beer "in any less quantity and in any other manner than as aforesaid."—He sold beer in pint and half-pint bottles, but the quantity thus sold at one time was not less than the amount which a cask of four and a half gallons or two dozen reputed quart bottles would contain.—The appellant having been convicted upon a summons under s. 3 of the Licensing Act, 1872, of having sold beer by retail without a licence:—*Held*, that the test of a sale of beer by retail was the quantity sold at any one time, and that the conviction was wrong. FAIRCLOUGH *v.* ROBERTS - - - - **350**

—— Use of house for purpose of the receipt of money by way of betting - - **529**
See GAMING.

LIGHTS, OBSTRUCTION OF — Compensation — Lands Clauses Act - - **40, 326**
See LANDS CLAUSES ACT. 1, 2.

LIMITATIONS, STATUTE OF (3 & 4 *Wm.* 4, *c.* 27), *s.* 25—*Devise on Trust—Possession by Trustees for twelve years—Claim by Heir-at-law—"Express Trust."*] The testator devised a house and all other his real estate to his executors upon trusts, the declaration of trust being as to the house only. He died seised of two other houses, and his executors took possession of them, and received the rents for more than twelve years from the death of the testator. His heir-at-law afterwards brought an action against the executors, alleging that the two houses vested in them in trust for him, and claimed execution of the trust:—*Held*, on the authority of *Salter* v. *Cavanagh* (1 Dru. & Wal. 668), that there was on the face of the will an express trust for the heir-at-law within s. 25 of the Statute of Limitations (3 & 4 Wm. 4, c. 27), and that his right was not barred. PATRICK *v.* SIMPSON - - **128**

LIMITATIONS, STATUTE OF—*continued.*
—— (37 & 38 Vict. c. 55)—Local Government Acts—Paving expenses—Charge upon premises - - - - 1
See Local Government. 3.

LOCAL GOVERNMENT—*Buildings—Contravention of Bye-law—Notice of Intention to pull down—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 158.] Where a building has been erected in contravention of the bye-laws of a local board of health, the board cannot, under s. 158 of the Public Health Act, 1875, pull down the building without giving the owner an opportunity of shewing cause why it should not be pulled down.—*Cooper* v. *Wandsworth District Board of Works* (14 C. B. (N.S.) 180); and *Masters* v. *Pontypool Local Government Board* (9 Ch. D. 677) approved. Hopkins and Another *v.* Smethwick Local Board of Health - - - **C. A. 712**

2. —— *New Building—Addition to existing Building—Hastings Improvement Act*, 1885 (48 & 49 *Vict. c. cxcvi.*), *s.* 111.] By s. 111 of the Hastings Improvement Act, 1885, "the making of any addition to an existing building by raising any part thereof . . . . shall for all the purposes of this Act and of any other local Act for the time being in force within the borough and of the Public Health Acts, and of any bye-law made thereunder respectively, be deemed to be the erection of a 'new building,' and the word 'building' shall, for all such purposes, include an erection or building of a permanent character of whatever material constructed." By bye-law 81 of the bye-laws duly made under the Public Health Act, 1875, "every person who shall intend to erect a building or otherwise to execute any work to which any of the bye-laws relating to new buildings may apply, shall, before beginning to erect such building or to execute such work, deliver or send, or cause to be delivered or sent, to the surveyor of the sanitary authority notice in writing, in which shall be specified the date on which such person will begin to erect such building or to execute such work;" and by bye-law 87 a penalty is imposed for offences against the bye-laws.—The respondent, a builder, had built a house with a conservatory on the first floor, in accordance with plans duly passed by the sanitary authority. Subsequently the respondent pulled down the conservatory, and in its place built a bedroom, a portion of one of the external walls of the house being raised for that purpose; the bedroom was of the same height as, and occupied no greater space than the conservatory, for which it was substituted. No notice under bye-law 81 was sent by the respondent to the surveyor before the erection of the bedroom. Upon a summons charging the respondent with not giving such notice before beginning to erect a building to which the bye-laws relating to new buildings applied, the justices held, that as the bedroom when erected did not occupy any greater space than was previously occupied by the conservatory, the respondent had not by the erection of the bedroom made an addition to an existing building within the meaning of s. 111 of the Hastings Improvement Act, 1885, and dismissed the summons:—*Held*, that the justices were wrong, and that the mere fact that the bedroom occupied

LOCAL GOVERNMENT—*continued.*
no greater space than the erection for which it was substituted did not necessarily prevent its being an addition to an existing building within the meaning of the section. Meadows *v.* Taylor [717

3. —— *Paving Expenses—Charge upon Premises—Limitation of Actions—Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *s.* 69—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *ss.* 62, 63—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 257—*Real Property Limitation Act* (37 & 38 *Vict. c.* 57), *s.* 8—"*Present right to receive.*"] Where a local authority had under s. 69 of the Public Health Act, 1848, incurred paving expenses, which by s. 62 of the Local Government Act, 1858 (corresponding to s. 257 of the Public Health Act, 1875), were made a charge upon the premises in respect of which the same were incurred:—*Held* (affirming the judgment of the Queen's Bench Division), that such expenses became a charge on the premises upon the completion of the works, and that the period of limitation in respect of such charge under the Real Property Limitation Act, 1874, s. 8, began to run from that date, not from the date of the apportionment of such expenses among the frontagers. Hornsey Local Board *v.* Monarch Investment Building Society **C. A. 1**

4. —— *Public Health (Buildings in Streets) Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3—*Building Line*—"*Front Main Wall of House*"—*Unfinished House*—"*On either side thereof.*"] The respondent began to erect the front main wall of a new house in a street: at that time B. had raised the front main wall of a new house, which he was erecting on the same side of the street, to the height of five inches above the ground: it did not appear to what extent the other walls of B.'s house had been built, or that they were connected with the front main wall: there was a distance of about 300 or 400 feet between the two houses, and there was no house between them: the front main wall of the respondent's house was six feet nearer the roadway than that of B.'s house:—*Held*, that the respondent had not erected any part of a house beyond the "front main wall of the house or building on either side thereof," within the meaning of s. 3 of the Public Health (Buildings in Streets) Act, 1888. Ravensthorpe Local Board *v.* Hinchcliffe - - **168**

5. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—"*Street*"—*Highway repairable by Inhabitants at large—Additions to ancient Highway—Expenses on Road—Liability of Frontagers.*] By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 160, the expenses of improving any street within any urban district "not being a highway repairable by the inhabitants at large" may be recovered from the frontagers, and "the same proceedings may be taken, and the same powers may be exercised, in respect of any street or road of which a part is or may be a public footpath or repairable by the inhabitants at large as fully as if the whole of such street or road was a highway not repairable by the inhabitants at large."—In proceedings under s. 150 it appeared that the street was formed by an old footpath and strips of land alongside which had been recently added to widen it. The old footpath

LOCAL GOVERNMENT—*continued.*
was repairable by the inhabitants at large. The justices found that the road was in part an ancient footpath or highway, but that it had been altered, widened, and added to, and houses having been built abutting thereon it was a street within ss. 4 and 150; that the frontagers were liable to contribute to the expenses of improving it; and an order was accordingly made for the payment by the frontagers of such expenses:—*Held* that, having regard to the terms of s. 150, the frontagers were chargeable with the expenses of improving the whole street and not merely such part of it as had been added to the ancient highway, and that the order was valid. Evans *v.* Newport Urban Sanitary Authority - - 264

—— Charge upon premises — Land charges registration - - - - 178
See Land Charges Registration.

LODGER—Parliament—Claim to be registered as voter — Power to amend declaration *See* Parliament. 3. [144

MANDAMUS—Bishop—Ecclesiastical law—Decorations forbidden by law—Representation of illegality by inhabitants of diocese—Discretion of bishop to stop proceeding *See* Ecclesiastical Law. [213

—— Officer of vestry—Superannuation allowance—Exercise of discretion - 371
See Metropolis—Management Acts.

MANOR—Income tax—"Profits"—Costs of collection - - - - 485
See Revenue. 6.

—— Inclosure Act—Reservation of exclusive right of shooting to lord of manor 468
See Inclosure Act.

MASTER AND SERVANT—Employers' Liability Act - - - - - 568
See Negligence.

METROPOLIS—*Coals—Sale and Delivery—Deficient Weight—Mode of weighing—Recovery of Penalties—Metropolis Coal Act*, 1831 (1 & 2 *Wm.* 4, *c. lxxvi.*), *ss.* 54, 57 (*local*).] The plaintiff purchased coal from the defendant in the metropolis, and on delivery of the same required the defendant's carman to weigh some of the sacks in which it was contained. The carman weighed the sacks by putting each of the full sacks in one scale and an empty sack together with the weights in the other scale. In an action for penalties under 1 & 2 Wm. 4, c. lxxvi., in respect of a deficiency of weight in the sacks so weighed:—*Held* (affirming the judgment of the Queen's Bench Division), that as the method of weighing prescribed by the section—viz., weighing the sacks "both with and without the coals therein"—had not been followed, the plaintiff was not entitled to recover.—*Meredith* v. *Holman* (16 M. & W. 798) approved. Smith *v.* Wood C. A. 23

METROPOLIS—MANAGEMENT ACTS—*Officer of Vestry—Superannuation Allowance—Discretion as to Amount—Exercise of Discretion*—29 & 30 *Vict. c.* 31, *ss.* 1, 4.] A metropolitan vestry has a discretion under 29 & 30 Vict. c. 31, s. 1, not merely as to granting or refusing a superannuation allowance to a retiring officer, but also, if an allowance be granted, as to the amount, subject to the scale of maximum allowances prescribed in s. 4.—*Reg.* v. *St. George's, Southwark* (19 Q. B. D. 533) overruled.—A vestry in declining to grant a superannuation allowance to a retiring officer were influenced by the idea that they had no discretion as to the amount:—*Held*, that the vestry had not properly exercised their discretion, and that a mandamus should go to them to consider and determine the application. The Queen *v.* Vestry of St. Pancras - [C. A. 371

2. —— *Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 129—*Scavengers—Removal of "refuse of trade"—Decision of Magistrate "final and conclusive"—Appeal by Special Case under Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Question of Law.*] By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 129, if any dispute arise between the owner or occupier of a house or land and the scavengers required to remove certain refuse, it shall be lawful for two justices ". . . to determine whether the subject-matter of dispute is or is not refuse of trade, manufacture or business . . . and in every such case the decision of such justices shall be final and conclusive." By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, "any person aggrieved who desires to question a conviction, order, determination or other proceeding of a Court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the Court to state a special case . . . . and if the Court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated."—A police magistrate, acting under the Metropolis Management Act, 1855, s. 129, decided that certain ashes from the furnaces of an hotel were not "refuse of trade" within the section, and declined to state a case on the ground that the decision was "final and conclusive" and no point of law arose:—*Held*, that, in the circumstances, there was a question of law upon the construction of s. 129, and that the magistrate was not entitled to refuse to state a case. Reg. *v.* Bridge - - - - - - 609

3. —— *Power of Vestry—Order to furnish Water-closet with proper Doors and Coverings—Summons for Neglecting to comply with such Order—Jurisdiction of Magistrate*—18 & 19 *Vict. c.* 120, *s.* 81—25 & 26 *Vict. c.* 102, *s.* 64.] By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 81, every house in certain specified districts must be provided with "a water-closet or privy and ashpit furnished with proper doors and coverings," and a penalty is imposed for neglecting to comply with this provision, and power is given to the vestry to give notice in writing to the owner or occupier requiring him "to provide a sufficient water-closet or privy and ashpit so furnished as aforesaid." By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 64, provision is made for recovery of penalties in case of default in compliance with an order of the vestry.—A vestry gave notice to the respondent requiring him to furnish proper doors and coverings to a water-closet; the respondent did not comply with the order, and did not

METROPOLIS—MANAGEMENT ACTS—*contd.*
appeal to the County Council; the vestry then summoned the respondent.—The magistrate held that the order of the vestry was wrongly made, and dismissed the summons:—*Held*, on a case stated, that the respondent's proper remedy, if he objected to the order of the vestry, was by appealing to the County Council; and, as he had not done so, the only questions for the decision of the magistrate were, whether the order of the vestry had in fact been made, and whether it had been disobeyed; and that if he decided those questions in the affirmative, he was bound to convict. VESTRY OF ST. JAMES AND ST. JOHN, CLERKENWELL *v.* FEARY - - - - - 703

MONEY IN COURT—Property recovered or preserved—Solicitor—Charging order 627
See PRACTICE. 24.

MONEY PAID—Illegal contract—Partial performance - - - - - 742
See ILLEGAL CONTRACT.

MORTGAGE—Lease—Assignment of whole term by way of mortgage—Bankruptcy of lessee—Disclaimer - - 65
See BANKRUPTCY. 4.

MUNICIPAL ELECTION—*Election Petition—Report of Commissioner—Persons reported for Corrupt Practices—Jurisdiction of High Court to deal with Report—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 92, 93, 100—*Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 23, *Sched. III., Pt. II.*] When, after the trial of a municipal election petition, the commissioner has reported persons as having been guilty of corrupt practices, the High Court has no jurisdiction to set aside, or amend, his report upon the ground that the notice prescribed by the Municipal Elections (Corrupt an Illegal Practices) Act, 1884, had not been given to the persons so reported. PREECE *v.* HARDING 110

NEGLIGENCE—*Master and Servant—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 3.] In an action for compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff was employed by the defendant to work at a machine in a shed. A carpenter, also in the employ of the defendant, used to receive directions from him or his foreman as to the work to be done, and give orders to the plaintiff and others as to what work each of them should do, which orders they were bound to obey; but he had no control over the plaintiff in his work. One morning the plaintiff was instructed by the carpenter as usual as to the work to be done by him. The plaintiff worked at it, and while he was working overtime in the evening the carpenter proceeded to stack timber in the shed, which was not safe for two persons to work in at the same time. By this negligence of the carpenter the timber fell, causing injury to the plaintiff:—*Held*, that the plaintiff was not entitled to recover, as the injury did not result from his having conformed to any order given by the carpenter to do any particular work, and therefore s. 1, sub-s. 3, of the Act did not apply. SNOWDEN *v.* BAYNES - - - - 568

NEGLIGENCE—*continued.*
—— Thistles—Neglect of occupier to cut thistles—Seeds blown on to adjoining land 656
See NUISANCE.

NEGOTIABLE INSTRUMENT—Promissory note—Payment—Indorsement for value without notice - - - 13
See PROMISSORY NOTE.

NEW BUILDING—Addition to existing building - - - - - - 717
See LOCAL GOVERNMENT. 2.

—— Local Government—Contravention of bye-law—Notice of intention to pull down
See LOCAL GOVERNMENT. [712

NEW TRIAL—County court—Power of judge to grant new trial. - - - 632
See COUNTY COURT. 4.

—— Excessive damages—Action for libel - 53
See PRACTICE. 19.

NOTICE—Objection—Borough vote—Service of notice of objection - - - 141
See PARLIAMENT. 2.

NUISANCE—*Thistles—Neglect of Occupier to cut Thistles—Seeds blown on to adjoining Land.*] An occupier of land is under no duty towards his neighbour to periodically cut the thistles naturally growing on his land, so as to prevent them from seeding; and if, owing to his neglect to cut them, the seeds are blown on to his neighbour's land and do damage, he is not liable. GILES *v.* WALKER - - - - - 656

OFFICIAL RECEIVER—Appeal against receiving order—Notice to official receiver 313
See BANKRUPTCY. 6.

OMNIBUS—Excise—Hackney carriage - 172
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PARDON—Effect of—Conviction of felony—Licensing Acts - - - 561
See LICENSING ACTS.

PARLIAMENT—*County Elector—Registration—Nature of Occupation, whether as Householder, or by virtue of Service—Payment of Rates—Poor-rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 7, 19—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 14—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 9, 32, 44 (1), 45 (7), 47 (1), 147—*Representation of People Act*, 1884 (48 *Vict. c.* 3), *ss.* 2, 3—*County Electors Act*, 1888 (51 *Vict. c.* 10, *s.* 2, *sub-s.* 1.] By the County Electors Act, 1888, any person possessing outside the limits of a borough the burgess qualification under the Municipal Corporations Act, 1882, is entitled to be registered under the Act as a county elector in the parish in which the qualifying property is situate.—By s. 32 of the Municipal Corporations Act, 1882: "(1) If an occupier of any qualifying property, whether the landlord is or is not liable to be rated to the parish in respect thereof, claims to be rated to the poor-rate in respect thereof, and pays or tenders to the overseers of the parish where the property is situate the full amount of the poor-rate last made in respect of such property, the overseers shall put the occupier's name on

PARLIAMENT—*continued.*
the rate-book in respect of that rate."—"(2) If they fail to do so, he shall nevertheless for the purposes of this Act be deemed rated to that rate."—The claimants were labourers residing in cottages on farms of their employers. They were permitted but not required to live in the cottages on the terms that they were to give up possession when their employment ceased, and were either charged a reduced rent or had the rent deducted from their wages. The rates were paid by the employers, and the names of the claimants appeared in the rate-book as occupiers:—*Held*, that the facts shewed an occupation by the claimants not by virtue of service but as householders, that the above section did not apply, and the claimants possessed a burgess qualification, and that they were therefore entitled to be placed on division one of the occupiers' list as both parliamentary voters and county electors. MARSH *v.* ESTCOURT - - 147

2. —— *Registration—Borough Vote—Service of Notice of Objection*—6 & 7 *Vict. c.* 18, *s.* 17.] By 6 & 7 Vict. c. 18, s. 17, the person objecting to a borough voter "shall give or cause to be left at the place of abode of the person objected to, as stated in the list, a notice numbered," &c. (according to the form prescribed).—An objector caused a notice to be placed in the letter-box at the house stated in the list to be the place of abode of the voter objected to. It appeared that the voter had not resided in the house for the last two years, that the objector did not know his true address, and that there was no reason to suppose that the notice reached or was likely to have reached the voter:—*Held*, that there had not been sufficient service of the notice within the meaning of the section.—*Allen* v. *Greensill* (4 C. B. 100) followed. GIFFORD *v.* OVERSEERS OF ST. LUKE'S, CHELSEA - - - 141

3. —— *Registration—Lodger Claim—Declaration—Power to amend Declaration—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 30, *sub-s.* 2—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 2—*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 2, *Form H. No.* 2.] A lodger claiming as sole tenant omitted to erase in his declaration, which was in the form prescribed in Form H., No. 2, Sched. 2 to s. 18 of the Registration Act, 1885, the words "(or as joint tenant with ——)":—*Held*, that the declaration being part of the statutory claim of a lodger, the revising barrister had power to correct the omission as a "mistake in a claim" under s. 28, sub-s. 2, of the Parliamentary and Municipal Registration Act, 1878. AINSLEY *v.* NICHOLSON - - - 144

4. —— *Registration—Successive Occupation of Houses as Servant and Householder—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 26—*Representation of the People Act*, 1884 (48 *Vict. c.* 3), *ss.* 2, 3.] Occupation during the qualifying period of two dwelling-houses in immediate succession, the first by virtue of service, the second as a householder, is a qualification for the parliamentary occupation franchise.—*Torish* v. *Clarke* (18 Ir. R. 285) approved. NICHOLSON *v.* YEOMAN - - - - - 145

PARTICULARS—County Court—Plaint entered by solicitor—Signature of particulars
See COUNTY COURT. 2, 3. [60, 533

—— Order for—Time for pleading extension of
See PRACTICE. 25. [174

PARTNERSHIP—Action against firm—Conditional appearance - - - 598
See PRACTICE.

PAWNBROKER—*Loan—"Special Contract"—Pawnbrokers Act*, 1872 (35 & 36 *Vict. c.* 93), *ss.* 10, 22, 24, *Sched.* 3, *Form* 7—*Liability to repay Balance due on Loan after Sale of Pledge.*] A special contract pawn ticket given under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 24, in Form 7 of Sched. 3, on a loan does not exclude the common law right of the pawnbroker to recover the balance due to him after sale of the pledge for less than the amount of the debt. JONES *v.* MARSHALL - - - - 269

PAYMENT—Executor and administrator—Plene administravit — Conflict of law and equity - - - - 364
See EXECUTOR AND ADMINISTRATOR.

—— Promissory note—Mortgage by way of further security — Sum received on transfer of mortgage—Indorsement for value without notice - - 13
See PROMISSORY NOTE.

PHARMACY ACT, 1868 (31 & 32 *Vict. c.* 121), *s.* 15—*Unregistered Assistant of Registered Chemist—Sale of Poison by—Liability of Assistant to Penalty.*] By s. 15 of the Pharmacy Act, 1868, it is provided that "any person who shall sell . . . . poisons . . . . not being a duly registered pharmaceutical chemist or chemist and druggist . . . . shall for every such offence be liable to pay a penalty or sum of 5*l.*":—*Held*, that an unregistered chemist's assistant who, in the absence of his master, sells any poison or preparation containing poison as in that Act defined, is liable to a penalty under the above section, notwithstanding that he effects such sale on behalf of his master, and that his master is duly registered. THE PHARMACEUTICAL SOCIETY *v.* WHEELDON [683

PLEADING—Libel—Matter in aggravation of damages - - - - 630
See PRACTICE. 21.

—— Time for, extension of—Particulars, order for—Effect of - - - 174
See PRACTICE. 25.

POISON, SALE OF—Unregistered assistant of registered chemist - - - 683
See PHARMACY ACT.

POOR LAW—*Illegitimate Child, Settlement of—Place of Birth—Mother living—Onus of Proof as to Settlement of Mother*—4 & 5 *Wm.* 4, *c.* 76, *s.* 71.] On appeal against an order of removal of an illegitimate child under the age of sixteen years, whereby such child was adjudged to be settled in the place of its birth, it was admitted by the respondents that the child's mother was still living, but no evidence was given to shew that she had any settlement, nor, on the other hand, was there any evidence of failure by the respondents to make inquiries:—*Held*, that in the absence of proof that the mother had a settlement else-

POOR LAW—*continued.*
where, the burden of which proof—there being no evidence of a failure by the respondents to make inquiries—was upon the appellants; the child must be deemed to be settled in the place of its birth. GUARDIANS OF HEADINGTON UNION *v.* GUARDIANS OF IPSWICH UNION - - **414**

2. —— *Settlement — Derivative Settlement — Child under Sixteen—Divided Parishes Act,* 1876 (39 & 40 *Vict. c.* 61), *s.* 35.] In determining the settlement of a pauper under the age of sixteen the father's settlement could not be ascertained, and it could not be shewn what settlement the pauper derived from his mother without inquiring into her derivative settlement:—*Held,* following the interpretation put on s. 35 of the Divided Parishes Act, 1876, in the House of Lords, in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (14 App. Cas. 465), that the prohibition in that section as to inquiry into the derivative settlement of a parent had no application to the case of children under the age of sixteen, and did not prevent the inquiry as to the mother's settlement. GUARDIANS OF POOR OF WEST DERBY UNION *v.* GUARDIANS OF POOR OF ATCHAM UNION - - - **C. A. 117**

3. —— *Settlement—Illegitimate Child under Sixteen—Divided Parishes Act,* 1876 (39 & 40 *Vict. c.* 61), *s.* 35.] Under s. 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), an illegitimate, like a legitimate, child cannot gain a settlement for itself while under the age of sixteen, but must follow the settlement of its mother. OVERSEERS OF MANCHESTER *v.* GUARDIANS OF ORMSKIRK UNION - - - **678**

4. —— *Settlement — Pauper aged Sixteen — Residence with Father — Divided Parishes Act,* 1876 (39 & 40 *Vict. c.* 61), *s.* 35; *Removal Acts,* 9 & 10 *Vict. c.* 66, *s.* 3; 11 & 12 *Vict. c.* 111, *s.* 1.] A child after living in the appellant union with its father, who had acquired a settlement by residence there under 39 & 40 Vict. c. 61, s. 35, removed with him into the respondent union, and while residing there with him attained the age of sixteen and became chargeable to that union.—An order was made for the removal of the child to the appellant union. At the date of the order the father had resided for a year in the respondent union so as to be irremoveable:—*Held,* that, notwithstanding the effect of 39 & 40 Vict. c. 61, s. 35, as to the settlement of a child of sixteen, the provisions of the 11 & 12 Vict. c. 111, as to removal applied, and, the father not being removeable, the child was not removeable. GUARDIANS OF MITFORD AND LAUNDITCH UNION *v.* GUARDIANS OF WAYLAND UNION - - **122**

POOR-RATE — *Rateable Value—Sewage Farm—Beneficial Occupation—Possible Tenant—Occupation by Owner.*] The appellants, under powers given them by statute, purchased, for the purpose of disposing of the sewage of Burton-upon-Trent, land for a sewage farm, and also land on which they erected a pumping-station, with all necessary engines and machinery to pump the sewage on to the farm. On appeals against assessments on the sewage farm and pumping station, cases were stated, in which it was found that it was impossible to work the farm except at a loss so long as

POOR-RATE—*continued.*
it remained a sewage farm, and that if the appellants desired to let it as a sewage farm they would be unable to find any one to take it, even at a nominal rent, and that the pumping-station, while used as part of the sewage system, was incapable of yielding a profit, but that if the sewage-farm and pumping-station belonged to a private owner the appellants would hire them at a yearly rent sufficiently high to support the rate:—*Held* (reversing the judgment of the Queen's Bench Division), on the authority of *Reg.* v. *School Board for London* (17 Q. B. D. 738), that in making the assessment the appellants ought to be considered as possible tenants, and that therefore the assessment was right. MAYOR, &C., OF BURTON-UPON-TRENT *v.* ASSESSMENT COMMITTEE OF BURTON-UPON-TRENT UNION. THE SAME *v.* CHURCHWARDENS, &C., OF EGGINTON AND ASSESSMENT COMMITTEE OF BURTON-UPON-TRENT UNION - - - - **C. A. 197**

POST OFFICE — Causing postman to intercept letter—Larceny—Liability as principal or accessory - - - - **439**
See CRIMINAL LAW. 3.

—— Weights and measures—Postmaster also a trader - - - - **181**
See WEIGHTS AND MEASURES.

PRACTICE—*Action against a Firm—Appearance—Conditional Appearance—Order* IX., *rr.* 6, 7; *Order* XII., *rr.* 13, 15, 16; *Order* XLII., *r.* 10.] There is no power under the Rules of the Supreme Court, in an action against a firm, to allow the entry of a conditional appearance, i.e., an appearance by a person which denies that such person is a partner in the firm. DAVIES & Co. *v.* ANDRÉ & Co. - - - - - **C. A. 598**

2. —— *Appeal—Trial with Jury—Judgment entered against Finding of Jury—Jurisdiction of Court of Appeal—Order* XXXIX., *r.* 1; *Order* XL., *rr.* 4, 5.] At a trial before a judge and jury the jury found a verdict for the plaintiff upon the claim, and for the defendant upon the counter-claim; upon further consideration the judge thought that there was no evidence which he ought to have left to the jury in support of the plaintiff's claim, and gave judgment for the defendant both upon the claim and counter-claim. The plaintiff having appealed to the Court of Appeal:—*Held,* that the appeal would not lie, and that the plaintiff's remedy was by motion in the Divisional Court under Order XXXIX., r. 1. ROCKE *v.* MCKERROW - - - **C. A. 463**

3. —— *Attachment of Debts—Administration in Bankruptcy of Estate of Person dying Insolvent—Dividend payable by Official Receiver—"Debt" liable to be attached—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 58, 62, 125—*Order* XLV., *r.* 1.] A dividend payable under the administration in bankruptcy of the estate of a person dying insolvent to a creditor of the estate is not a debt liable to be attached within the meaning of Order XLV., r. 1. PROUT *v.* GREGORY - - - **281**

4. —— *Costs—Appeal—Discretion—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 116.] Sect. 116 of the County Courts Act, 1888, gives the Court or a judge a discretion to allow costs

PRACTICE—*continued.*

on the High Court scale in actions brought in the High Court and founded on contract, in which the plaintiff has recovered a sum of 20*l.* or upwards, but less than 50*l.*; so that by virtue of s. 49 of the Judicature Act, 1873, no appeal lies from an order allowing such costs. Bazett *v.* Morgan - - - - - - - **48**

5. —— *Costs—Appeal—Stay of Proceedings—Discretion—Order* lviii., *r.* 16.] Order lviii., r. 16, gives the Court against whose decision an appeal is pending a discretion to refuse the appellant a stay of proceedings; and no practice binding on the Courts has, or can be, established to the effect that the Court will only refuse a stay of proceedings as to costs upon the terms that the respondent's solicitor shall give an undertaking to repay, in the event of the appeal being successful, the costs paid to him by the appellant. Attorney-General *v.* Emerson [**C. A. 56**

6. —— *Costs—Plea of Tender before Action—Payment into Court—Taxation of Plaintiff's Costs—Order* xxii., *r.* 7.] To a claim for money had and received to the plaintiff's use the defendants pleaded tender of a sum to the plaintiff before action, and payment of that sum into Court in full satisfaction of the claim. The plaintiff took the money out of Court in satisfaction of his claim, and sought to have his costs taxed under Order xxii., r. 7:—*Held*, that the plaintiff was not entitled to proceed under rule 7, because the plea of tender raised an issue which remained unsatisfied upon the record, and in respect of which the defendants were entitled to go to trial. Griffiths *v.* School Board of Ystradyfodwg [**307**

7. —— *County Court—Power to remit Action—Judgment under Order* xiv. *for part of Claim—Reduction of Claim to a sum not exceeding* 100*l.*—"*Payment, an admitted Set-off, or otherwise*"—*County Courts Act*, 1856 (19 *&* 20 *Vict. c.* 108), *s.* 26—*County Courts Act*, 1867 (30 *&* 31 *Vict. c.* 142), *s.* 7—*County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 65.] By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65, where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off or otherwise, to a sum not exceeding 100*l.*, an order may be made for the trial of the action in a county court.—In an action of contract brought in the High Court in which the claim indorsed on the writ originally exceeded 100*l.*, but had been reduced to an amount not exceeding 100*l.* by a payment by the defendant pursuant to a judgment under Order xiv., the plaintiff obtained an order for the trial of the action in the county court. The defendant appealed:—*Held*, by Denman, J., that under s. 65 of the County Courts Act, 1888, there was jurisdiction to make the order:—*Held*, by Wills, J., that "payment," in s. 65 of the County Courts Act, 1888, refers only to payment before action, and that there was therefore no jurisdiction under that section to make the order.—*Foster* v. *Usherwood* (3 Ex. D. 1) and *Gray* v. *Hopper* (21 Q. B. D. 15, 246) considered. Hodgson *v.* Bell - . - - **302**

PRACTICE—*continued.*

8. —— *County Court—Power to remit Action—Judgment under Order* xiv. *for part of Claim—*"*Payment, an admitted Set-off, or otherwise*," *Construction of—County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 65.] By the County Courts Act, 1888, s. 65, where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 100*l.*, an order may be made for the trial of the action in a county court.—In an action of contract brought in the High Court, in which the claim indorsed on the writ, though it originally exceeded 100*l.*, had been reduced to a sum not exceeding 100*l.* by a payment made by the defendant to the plaintiff in pursuance of a judgment under Order xiv. for part of the plaintiff's claim:—*Held* (reversing the decision of the Queen's Bench Division), that "payment" in s. 65 meant payment before action, and there was therefore no jurisdiction, under that section, to order the trial of the action in the county court. Hodgson *v.* Bell - - - **C. A. 525**

9. —— *Discovery—Interrogatories—Security for Costs—Deposit—Discretion of Judge—Order* xxxi., *rr.* 25, 26.] A judge or master has, under Order xxxi, r. 25, a discretion to dispense with the deposit for security for the costs of discovery, prescribed by rules 25, 26, of the order. Newman *v.* London and South Western Railway Company - - - - - - **454**

10. —— *Discovery—Interrogatories to Town Clerk of Corporation—Solicitor—Privilege.*] In an action by a corporation interrogatories were administered by the defendant for the examination of the town clerk, who objected in his answer to answer certain of the interrogatories, on the ground that the information possessed by the plaintiffs or himself had been obtained by him as the solicitor for the plaintiffs in the action for the purpose of enabling the plaintiffs to bring and maintain the action:—*Held*, that, as the corporation had no option to answer by any officer other than the town clerk, but were compelled to answer through him, the privilege was properly claimed by him on their behalf, and the objection was good.—*Mayor of Swansea* v. *Quirk* (5 C. P. D. 106) distinguished. Corporation of Salford *v.* Lever - - - - - - **695**

11. —— *Infant—Discovery—Interrogatories—Order* xvi., *rr.* 16, 21; *Order* xix., *r.* 13, *Order* xxxi., *Order* xxxii.; *Order* xxxiv., *r.* 4.] An infant plaintiff or defendant cannot be compelled to answer interrogatories. Mayor *v.* Collins [**361**

12. —— *Inspection—Affidavit of Documents—Document not disclosed in—Jurisdiction to order Inspection of—Order* xxxi., *rr.* 17, 18.] Where a party applying for inspection of a specific document under Order xxxi., r. 18, makes an affidavit specifying such document, and stating that he believes the document to contain entries which he would be entitled to inspect, and that it is in the possession or power of the other party, the Court may order inspection of such document, notwithstanding that the other party may have previously made an affidavit of documents under

PRACTICE—*continued.*

r. 13 omitting to disclose such document, and concluding with the general averment that, save as therein disclosed, he has not in his possession or power "any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document or any other document whatsoever relating to the matters in question in the action." WIEDEMAN *v.* WALPOLE - - - **537**

13. —— *Inspection—Affidavit of Documents—Documents not Disclosed—Jurisdiction to order Inspection—Order* XXXI., *rr.* 17, 18.] WIEDEMAN *v.* WALPOLE - - - - **C. A. 626**

14. —— *Interpleader—Claim of Applicant for "Charges"—Jurisdiction to order Payment—Wharfage Charges—Order* LVII., *rr.* 2, 15.] The Court or a judge has power, under Order LVII., r. 15, to make an order for payment of the charges of a wharfinger who has interpleaded. DE ROTHSCHILD FRÈRES *v.* MORRISON, KEKEWICH & Co. LA BANQUE DE PARIS ET DES PAYS BAS *v.* THE SAME. LA BANQUE DE FRANCE *v.* THE SAME **[C. A. 750**

15. —— *Interpleader—Goods taken in Execution—Bill of Sale—Prior Mortgage—Title of Grantee of Bill of Sale as against Execution Creditor.*] A mortgagor of a house with the trade fixtures subsequently granted to the claimant a bill of sale of the chattels, including the trade fixtures, upon the premises. The trade fixtures and other chattels were taken in execution under a judgment against the mortgagor. In an interpleader issue between the claimant and the execution creditor:—*Held*, that the claimant having become possessed of the equity of redemption in the goods under the bill of sale was entitled to them as against the execution creditor. *Richards* v. *Jenkins* (18 Q. B. D. 451) distinguished. USHER *v.* MARTIN - - - - **272**

16. —— *Interpleader—Shares—Certificate and Transfer—Chose in action—Order* LVII., *rr.* 1, 2.] The Plaintiff was registered proprietor of shares in a public company, and held a certificate that he was registered as owner of the shares. He executed a transfer to the defendants, who were brokers, to enable them to sell the shares, and handed to them the certificate and transfer for that purpose. The claimant gave the defendants notice that he claimed the shares, and the plaintiff demanded back the certificate and transfer. The defendants applied for an interpleader order:—*Held* (affirming the judgment of the Queen's Bench Division), that, as the claimant was in effect claiming the documents, the defendants were entitled to interplead.—*Semble*, that a chose in action may be the subject of interpleader. ROBINSON *v.* JENKINS - **C. A. 275**

17. —— *Interrogatories—Action for Libel—Payment into Court—Sufficiency of Answer—Inquiry as to extent of Circulation of Newspaper—Inquiry as to source of Information.*] In an action for libels contained in a newspaper and a pamphlet, accusing the plaintiff of being the author of certain discreditable letters, copies of which were printed in the libels, the only defence being payment into Court of 40*s.*, which the defendants alleged to be enough to satisfy the

PRACTICE—*continued.*

plaintiff's claim, the plaintiff delivered interrogatories, asking, by the first and second, as to the extent of the circulation of the newspaper and pamphlet, and, by the others, as to the names of the persons from whom the letters were obtained, what was paid for them, and what inquiries were made, and what steps taken, to test and verify the information supplied to the defendants.—The defendants answered, as to the first two interrogatories, admitting a large circulation, but declining to answer further, on the ground that the information required could not be obtained without a difficult and troublesome inquiry, that the answer would involve disclosure of the defendants' business transactions, and that the precise number of copies issued was not material or relevant, and declining to answer the other interrogatories on the grounds that they were irrelevant and not material, and that their object was to discover the evidence to be adduced in support of the defendants' case, and that they were unreasonable, unnecessary, and vexatious, and not put bonâ fide for the purposes of the action, but for the purpose of criminating third parties, not parties to the action, and that the matters inquired into related solely to the defendants' case.—On an application by the plaintiff for an order for a further answer:—*Held*, that as to the first and second interrogatories, the defendants were bound to answer further, stating approximately the extent of the circulation, but that the other interrogatories were not sufficiently relevant or material to entitle the plaintiff to an answer. PARNELL *v.* WALTER - - - - **441**

18. —— *Interrogatories—Objection to Answering—Order striking out Interrogatories—Rules of the Supreme Court*, 1883, *Order* XXXI., *rr.* 6, 7.] An order cannot be made under Order XXXI., r. 7, striking out those parts of a set of interrogatories which the judge considers objectionable.—Any objection which the party interrogated may have to answering should be taken in the affidavit in answer. SAMMONS *v.* BAILEY - **727**

19. —— *New Trial—Excessive Damages—Action for Libel.*] Where the plaintiff has obtained a verdict in an action for libel, the Court will not grant a new trial on the ground of excessive damages, unless they think that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably have given them.—In assessing damages the jury are entitled to take into consideration the whole conduct of the defendant in the matter from the time the libel was published down to the time their verdict is given. PRAED *v.* GRAHAM **[C. A. 53**

20. —— *Order* XIV.—*Summons for Judgment—Application made after Delivery of Defence—Jurisdiction to make Order.*] An application for leave to sign judgment under Order XIV., r. 1, need not necessarily be made before the defendant has, in the ordinary course, delivered his defence, but if the application is made after that time, the plaintiff must shew circumstances which justify the delay. MCLARDY *v.* SLATEUM **504**

21. —— *Pleading—Matter in Aggravation of Damages—Libel—Rules of Supreme Court*, 1883, *Order* XIX., *r.* 27.] A paragraph in a statement

PRACTICE—*continued.*

of claim in an action for a libel published in a newspaper stated that the defendant knew that the words published would be, and the same in fact were, repeated and published in other editions of the same newspaper:—*Held*, that evidence of the facts stated in this paragraph would be admissible at the trial, and therefore the paragraph was properly pleaded and ought not to be struck out. WHITNEY AND OTHERS *v.* MOIGNARD - - - - - **630**

22. —— *Prohibition—County Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 127—*Rules of the Supreme Court, Order* LIX., *rr.* 1, 8*a*.] An application for a writ of prohibition to a county court may be made to a judge sitting at chambers, notwithstanding Order LIX., r. 8*a* of the Rules of the Supreme Court, December, 1888, which provides that "every application for a prohibition to a county court . . . . shall be brought by notice of motion." KING *v.* CHARING CROSS BANK - - - - - **27**

23. —— *Security for Costs—Action by undischarged Bankrupt—Cause of Action arising after Bankruptcy.*] The Plaintiff, a bankrupt, whose discharge was suspended until he had paid 5*s.* in the pound, sued the defendant for arrears of rent in respect of premises let by him to the defendant subsequently to his bankruptcy:—*Held* (affirming the decision of the Queen's Bench Division) that the plaintiff ought not to be ordered to give security for the costs of the action. COOK *v.* WHELLOCK - - - **C. A. 658**

24. —— *Solicitor and Client—Solicitors' Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—"*Property Recovered or Preserved*"—*Money paid into Court under Order* XIV.—*Charging Order.*] The plaintiff's solicitors obtained an order under Order XIV. that the defendant should, as a condition of leave to defend, pay the amount claimed into Court. Subsequently the plaintiff, without the knowledge of his solicitors and without making any provision for their costs, compromised the action, and discharged them from their employment. The defendant then applied for an order for the payment out to him of the money in Court, and produced the Plaintiff's consent to such order being made; but the master being of opinion that the compromise was collusive refused to make the order. The solicitors then applied under s. 28 of the Solicitors' Act, 1860, for a charging order upon the money in Court:—*Held*, that the money in Court was under the circumstances "property preserved" within the meaning of the section, and that there was jurisdiction to make a charging order. MOXON *v.* SHEPPARD [627

25. —— *Time for Pleading, Extension of—Order for Month "peremptory"—Particulars, Order for, Effect of—Order* XIX., *r.* 8.] Order XIX., r. 8, provides that the party at whose instance particulars have been delivered under a judge's order shall, unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons.—Upon an application by a defendant for further time for delivering defence an order was made giving him a month peremptory. The defendant subsequently

PRACTICE—*continued.*

obtained an order for particulars:—*Held*, that Order XIX., r. 8, did not apply, and that the defendant was not by reason of the order for particulars entitled to any time beyond the month given by the peremptory order. FALCK *v.* AXTHELM [C. A. 174

26. —— *Writ of Summons—Indorsement—Address of Plaintiff—Residence—Rules of Supreme Court*, 1883, *Order* IV., *r.* 1, *Appendix A, Part I., Form I.*] It is not a sufficient compliance with Order IV., r. 1, and Appendix A, Part I., Form I., to state in the indorsement upon a writ of summons the place where the plaintiff carries on business. The indorsement must state where he resides. STOY *v.* REES - - - **748**

—— County Court—Costs—Plaint entered by Solicitor—Signature of Particulars *See* COUNTY COURT. 2, 3. [**60, 533**

—— Married woman—Attachment of debt **103** *See* HUSBAND AND WIFE.

—— Solicitor—Dealings with client—Purchase of subject-matter of suit - - **519** *See* SOLICITOR.

PROHIBITION—County court—Judge at chambers - - - - - **27** *See* PRACTICE. 22.

PROMISSORY NOTE—*Negotiable instrument—Promissory Note payable on Demand—Mortgage by way of Further Security—Sum received on Transfer of Mortgage—Payment—Non-extinguishment of Note—Indorsement for Value without Notice—Re-issue of Note, what amounts to.*] The payee of a promissory note payable on demand, which had been given by the defendant by way of security for a debt, had also taken from the defendant, as a further security for the same debt, a mortgage of certain property. He transferred the mortgage to another person, receiving on such transfer from the transferee a sum equal to the amount of the debt. He subsequently indorsed the promissory note which remained in his hands to the plaintiff for value, the plaintiff having no knowledge of the circumstances:—*Held*, that the note, not having been paid or returned to the maker, was still current at the time of the indorsement, and the plaintiff as a bonâ fide indorsee for value was entitled to recover upon it.—*Bartrum* v. *Caddy* (9 A. & E. 275) distinguished. GLASSCOCK *v.* BALLS - - - - - **C. A. 13**

RAILWAY AND CANAL COMMISSION—*Jurisdiction—Power to require a Railway Company to Resume Passenger Traffic on a part of its line on which Passenger Traffic has been discontinued—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2, 3—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *ss.* 1, 8.] The Court has jurisdiction under ss. 1, 2, 3 of the Railway and Canal Traffic Act, 1854, to require a railway company to resume passenger traffic on a part of its line on which passenger traffic has been discontinued.—*South Eastern Ry. Co.* v. *Railway Commissioners and the Corporation of Hastings* (5 Q. B. D. 217; 6 Q. B. D. 586), and *Dickson* v. *Great Northern Ry. Co.* (18 Q. B. D. 176) considered. WINSFORD LOCAL BOARD *v.* CHESHIRE LINES COMMITTEE - - - **R. C. C. 456**

RAILWAY COMPANY — *Compensation — Land taken compulsorily or injuriously affected—Trial in Superior Court—Right to Compensation—Order for Trial by Judge of High Court—Jurisdiction—Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *s.* 41.] By s. 41 of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), "whenever, in the case of any lands purchased or taken otherwise than by agreement for the purposes of any public railway, any question of compensation in respect thereof, or any question of compensation in respect of lands injuriously affected by the execution of the works of any public railway, is, under the provisions of the Lands Clauses Consolidation Act, 1845, to be settled by the verdict of a jury empannelled and summoned as in that Act mentioned, the company, or the party entitled to the compensation, may . . . . apply to the judge of any one of the superior courts of Common Law, who shall, if he thinks fit, make an order for trial of the question in one of the superior Courts, upon such terms and in such manner as to him shall seem fit, &c.; . . . . and the proceedings shall be under and subject to the control and jurisdiction of the Court as in ordinary actions therein":—*Held*, that, the question to be tried under s. 41, by a judge of a superior Court with a jury, was the same as that previously tried by the sheriff with a jury, and that consequently the judge and jury had no jurisdiction to determine the title to the compensation, but could only determine the amount.—*Semble*, that, notwithstanding the Judicature Acts and Rules, a trial in the High Court under s. 41 cannot be by a judge without a jury.—IN RE THE EAST LONDON RAILWAY COMPANY. OLIVER'S CLAIM [C. A. 507

RECOGNIZANCE—Estreat of appeal from conviction - - - - 675
See SESSIONS.

REGISTRATION — "Land charges" — Charges under Public Health Act, 1875—Land charges registration - - 178
See LAND CHARGES REGISTRATION.

RESTRAINT OF TRADE — Friendly society — Illegal rules - - - 252
See FRIENDLY SOCIETY.

REVENUE—*Duties on Personal Property—Voluntary Settlement—Retrospective operation of Statute—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11.] The Customs and Inland Revenue Act, 1881, by s. 38 (*c*), imposes stamp duty upon personal property "passing under any past or future voluntary settlement" if a life interest is reserved to the settlor.—The Customs and Inland Revenue Act, 1889, s. 11, enacts that the above section "is hereby amended as follows: the description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust . . . in favour of a volunteer . . . and whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person."—Upon demurrer to an information for stamp duty alleged to be due, under s. 38 of the Customs and Inland Revenue Act, 1881, in respect of personal property to which certain persons became entitled in 1885, under a settlement:—

REVENUE—*continued.*
Held, that the provisions of s. 11 of the Act of 1889 were retrospective, and that the construction provided by that section must be applied to the description of the property sought to be taxed, and this although the property passed to the beneficiaries, and the proceedings to recover the duty were taken, before the second Act came into force. ATTORNEY-GENERAL *v.* THEOBALD 557

2. —— *Excise—Carriages—Hackney Carriage—Standing or plying for Hire—Omnibus—Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 4.] Sect. 4, sub-s. 1, of the Customs and Inland Revenue Act, 1888, imposes a duty upon every hackney carriage as thereinafter defined, and by sub-s. 3 a "hackney carriage" means "any carriage standing or plying for hire":—*Held*, that an ordinary omnibus running along a fixed route is a "hackney carriage" within the meaning of the Act. HICKMAN *v.* BIRCH - - 172

3. —— *Income Tax—Annuities payable out of Profits or Grains—Assessment of Profits or Gains—Income Tax Acts*—5 & 6 *Vict. c.* 35, *s.* 102.] An insurance society granted life annuities in consideration of a single sum paid by the applicant at the time of granting the annuity, and they claimed to deduct from the amount of their profits chargeable with income tax the sums paid by them in discharge of the annuities so granted:—*Held*, that the annuities were paid out of "profits or gains" within the meaning of 5 & 6 Vict. c. 35, s. 102, and were therefore chargeable with income tax in the hands of the society by virtue of that section. GRESHAM LIFE ASSURANCE SOCIETY *v.* STYLES - - - - 500

4. —— *Income Tax—Annuity—Application of Balance to Repayment—Income*—16 & 17 *Vict. c.* 34, *Sched. D.*] By an agreement between the Government of the Nizam of Hyderabad and an English company incorporated for the purpose of constructing a railway through his dominions, the Government agreed to pay for twenty years to the company in London an annuity equal to 5 per cent. per annum on the issued capital, the company being bound by the agreement to apply the annuity in payment of interest at 5*l.* per cent. per annum on the share capital paid up, and of interest at 4*l.* per cent. per annum on the debentures of the company, and to pay over the balance, viz., 1*l.* per cent., to trustees, to form a sinking fund for the redemption of the debenture capital. The company duly received the annuity and paid over such balance accordingly. They claimed to deduct the balance from an assessment on them to the income-tax under 16 & 17 Vict. c. 34, Sched. D.:—*Held*, that they were liable to be assessed to the income-tax in respect of the whole amount of the annuity received by them, and were not entitled to any deduction in respect of the balance applied to the purposes of the sinking fund. H. R. H. THE NIZAM STATE RAILWAY COMPANY *v.* WYATT - - - - 548

5. —— *Income Tax — Deductions—Premium on Life Assurance—Insurance Company abroad*—16 & 17 *Vict. c.* 34, *s.* 54; 16 & 17 *Vict. c.* 91, *s.* 1.] By the Income Tax Act (16 & 17 Vict. c. 34), s. 54, provision is made for the deduction of the premium on life insurance from assessments under Schedule D., and by 16 & 17 Vict. c. 91, s. 1, the

REVENUE—*continued.*

benefit of the provision is extended to any person who shall have made insurance on his life "in or with any insurance company existing on November 1, 1844, or in or with any insurance company registered pursuant to 7 & 8 Vict. c. 110)":—*Held*, that the provision does not apply to an insurance with a foreign company, although such company was in existence on November 1, 1844. COLQUHOUN *v.* HEDDON - - - 491

6. —— *Income Tax—Manor—"Profits"—Cost of Collection—Deductions*—5 & 6 *Vict. c.* 35, *s.* 60, *Sched. A., No. II.*] In estimating the annual value of the "profits" of a manor for assessment to the Income Tax under 5 & 6 Vict. c. 35, s. 60, Sched. A., No. II., no deduction can be made in respect of expenses incurred by the lord of the manor in collecting the manorial dues, at any rate where it does not appear that such expenses must necessarily be incurred before the dues can be obtained.—*Stevens* v. *Bishop* (19 Q. B. D. 442; 20 Q. B. D. 442) considered. DUKE OF NORFOLK *v.* LAMARQUE - - - 485

7. —— *Stamp—Settlement—Contingent Interests—Stock vested in Trustees—Power to vary Investments—Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *s.* 3—*Schedule.*] By the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 3, and schedule, an ad valorem duty is imposed on "Any instrument . . . whereby any definite and certain principal sum of money . . . or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever:—*Held*, that a settlement of contingent and reversionary interests in certain specified amounts of stock which was vested in trustees with power to vary the securities at their discretion, was liable to duty under the section and schedule. ONSLOW *v.* COMMISSIONERS OF INLAND REVENUE - - 584

RULES:—

—— **Order IV., r. 1, Appendix A., Part I., Form I** *See* PRACTICE. 26. [748

—— **Order VI., r. 10, and Appendix** - 60
See COUNTY COURT. 2.

—— —— —— - - - - 533
See SOLICITOR.

—— **Order IX., rr. 6, 7** - - - 598
See PRACTICE.

—— **Order XII., rr. 13, 15, 16** - - 598
See PRACTICE.

—— **Order XIV.** - - - - 504
See PRACTICE. 20.

—— —— —— - - - - 525
See PRACTICE. 7.

—— —— —— - - - - 627
See PRACTICE. 24.

—— **Order XVI., rr. 16, 21** - - - 361
See PRACTICE. 11.

—— **Order XIX., r. 8** - - - 174
See PRACTICE. 25.

—— —— **r. 13** - - - - 361
See PRACTICE. 11.

—— —— **r. 27** - - - - 630
See PRACTICE. 21.

—— **Order XXII., r. 7** - - - 307
See PRACTICE. 6.

RULES—*continued.*

—— **Order XXXI.** - - - - 361
See PRACTICE. 11.

—— —— **rr. 6, 7** - - - - 727
See PRACTICE. 18.

—— —— **rr. 17, 18** - - - - 537
See PRACTICE. 12.

—— —— —— - - - - 626
See PRACTICE. 13.

—— —— **rr. 25, 26** - - - - 454
See PRACTICE. 9.

—— **Order XXXII.** - - - - 361
See PRACTICE. 11.

—— **Order XXXIV., r. 4** - - - 361
See PRACTICE. 11.

—— **Order XXXIX., r. 1** - - - 463
See PRACTICE. 2.

—— **Order XL., rr. 4, 5** - - - 463
See PRACTICE. 2.

—— **Order XLII., r. 10** - - - 598
See PRACTICE.

—— **Order XLV., r. 1** - - - 103
See HUSBAND AND WIFE.

—— —— —— - - - - 281
See PRACTICE. 3.

—— —— —— - - - - 519
See SOLICITOR.

—— **Order L., r. 16, Appendix Scale** - 113
See WITNESS.

—— **Order LVII., rr. 1, 2** - - - 275
See PRACTICE. 16.

—— —— **rr. 2, 15** - - - - 750
See PRACTICE. 14.

—— —— —— - - - - 313
See BANKRUPTCY. 6.

—— **Order LVIII., r. 16** - - - 56
See PRACTICE. 5.

—— **Order LIX., rr. 1, 8a** - - - 27
See PRACTICE. 22.

SALE OF GOODS—*Contract to Manufacture equal to Sample—Latent Defect in Sample—Implied Warranty of Merchantableness—Limits of.*] The plaintiff carried on two businesses, that of a woollen merchant and that of a tailor. The defendants, woollen manufacturers, contracted with the plaintiff as a woollen merchant to manufacture and supply to him indigo blue cloth according to sample. The plaintiff intended to use the cloth in his tailor's business for the purpose of making it into servants' liveries; but neither the fact that the plaintiff was a tailor nor that he intended to use the cloth for liveries was known to the defendants. There was evidence that one of the ordinary uses to which that particular kind of cloth was applied was the making of liveries. The defendants supplied to the plaintiff cloth which corresponded with the sample; but the sample, owing to a latent defect, was unsuited for the purpose of being made into liveries, though there was no evidence that it was unsuitable for other purposes for which cloth of that description was frequently used. The plaintiff having brought an action against the defendants for breach of an implied warranty of merchantableness, the judge left to the jury the

SALE OF GOODS—*continued.*
question whether the cloth was merchantable as supplied to woollen merchants, and refused to leave to them the question whether an ordinary and usual use of cloth of that description was the making of it into liveries:—*Held*, that the judge was right in refusing to leave the latter question to the jury, and that there was no misdirection. JONES *v.* PADGETT - - 650

SAMPLE—Contract to manufacture equal to sample — Implied warranty of merchantableness - - - 650
See SALE OF GOODS.

SCIENTER—Adulteration—Food sold in altered state - - - - - 353
See ADULTERATION.

SECURITY FOR COSTS—Action by undischarged bankrupt—Cause of action arising after bankruptcy - - - - 658
See PRACTICE. 23.

—— Interrogatories—Power to dispense with deposit - - - - 454
See PRACTICE. 9.

SEPARATE ESTATE—Married woman—Attachment of debts - - - 103
See HUSBAND AND WIFE.

—— Restraint on anticipation—Contract - 98
See HUSBAND AND WIFE. 2.

SERVICE—Bankruptcy notice or petition—Substituted service—Debtor out of jurisdiction - - - - 723
See BANKRUPTCY. 11.

—— Notice of objection—Borough vote—Parliament - - - - - 141
See PARLIAMENT. 2.

—— Occupation—County vote—Farm labourer —Residence in cottage on farm - 147
See PARLIAMENT.

—— Order appointing time and place for bankrupt's public examination—Service by post - - - - - 466
See BANKRUPTCY. 10.

SESSIONS—*Practice—Appeal from Conviction—Recognizance out of Time—Estreat of—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* (3).] By s. 31 of the Summary Jurisdiction Act, 1879, it is provided that, "where any person is authorized by this Act or by any future Act to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court, subject to the conditions and regulations following":—(3.) "The appellant shall, within the prescribed time, or, if no time is prescribed, within three days after the day on which he gave notice of appeal, enter into a recognizance . . . conditioned to appear at the said sessions and to try such appeal, and to abide the judgment of the Court of Appeal thereon, and to pay such costs as may be awarded by the Court of Appeal":—*Held*, that a recognizance which has been entered into by the appellant after the expiration of the three days is not void, and that the court of quarter sessions, although by reason of the recognizance being out of time it has no jurisdiction to hear the appeal, has jurisdiction to estreat the recognizance for non-payment of

SESSIONS—*continued.*
such costs as may have been awarded upon the dismissal of the appeal. THE QUEEN *v.* THE JUSTICES OF GLAMORGANSHIRE - - 675

SETTLEMENT—Poor Law - - - 117
See POOR LAW. 2.

—— Poor Law - - - - 678
See POOR LAW. 3.

—— Poor Law—Illegitimate child, settlement of
See POOR LAW. [414

—— Stamp duty—Contingent interests - 584
See REVENUE. 7.

—— Stamp duty—Voluntary settlement - 557
See REVENUE.

SEWAGE FARM—Rateable value — Beneficial occupation—Possible tenant — Occupation by owner - - - 197
See POOR RATE.

SEWERING AND PAVING—Local Government Acts — Paving expenses — Statute of Limitations - - - - 1
See LOCAL GOVERNMENT. 3.

—— Street Highway repairable by inhabitants at large—Additions to ancient highways
See LOCAL GOVERNMENT. 5. [264

SHARES—Transfer of—Death of shareholder—Register of shareholders—Transfer of shares by one of two executors—Estoppel - - - - - 77
See COMPANY.

SHERIFF—*Withdrawal of Execution—Liability of Execution Creditor—Fees—Taxation of Amount —Appeal*—50 & 51 *Vict. c.* 55, *s.* 20—*The Sheriffs Act*, 1887—*Order of August* 31, 1888, *as to Fees.*] By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 20, a sheriff may demand such fees and poundage as may from time to time be fixed by the Lord Chancellor, with the consent of the judges, and the concurrence of the Treasury.—By Order of August 31, 1888, made under the Act, fees were fixed, and "In every case where an execution is withdrawn, satisfied, or stopped, the fees under this order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be; and the amount of any costs and charges payable under this scale shall be taxed by a master of the Supreme Court or district registrar of the High Court (as the case may be), in case the sheriff and the party liable to pay such costs and charges differ as to the amount thereof":—*Held*, that there was no appeal from the taxation of the amount of costs and charges payable under this Order to the sheriff. TOWNEND *v.* SHERIFF OF YORKSHIRE 621

SHIP—*Charterparty—Construction of Guarantee as to Ship's Capacity.*] A charterparty, which provided that the ship should "load a cargo of creosoted sleepers and timbers," contained the following clauses: "Charterer has option of shipping 100/200 tons of general cargo;" and "Owners guarantee ship to carry at least about 90,000 cubic feet or 1500 tons dead weight of cargo":—*Held*, that the latter clause did not amount to a warranty that the ship should be able to carry about 90,000 cubic feet of the

SHIP—*continued.*
description of cargo which the charterer was under the previous clauses entitled to tender, but was merely a warranty of the carrying capacity of the ship. CARNEGIE *v.* CONNER - - 45

2. —— *Demurrage—Bill of Lading—Evidence of Contract by Consignee under Bill of Lading to be liable for Demurrage incurred at Port of Loading.*] Goods were shipped on board the plaintiffs' vessel under a bill of lading in which the defendants were named as consignees. The property in the goods had not passed to the defendants by reason of the consignment within the meaning of the Bills of Lading Act, 1855, and they were, and were known by the plaintiffs to be, acting as agents. By the bill of lading the cargo was to be delivered on payment of freight "and other conditions as per charterparty." By the charterparty demurrage was payable, and the plaintiffs had a right of lien in respect thereof. Before the arrival of the vessel at the port of discharge the plaintiffs informed the defendants that demurrage was payable in respect of delay at the port of loading. The defendants refused to pay demurrage, but paid the freight, and took delivery of part of the cargo, the plaintiffs exercising their lien for demurrage over the residue:—*Held*, that there was no evidence of a contract on the part of the defendants to pay demurrage. *Wegener* v. *Smith* (15 C. B. 285) considered. STEAMSHIP "COUNTY OF LANCASTER," LIMITED *v.* SHARP & CO. [158

3. —— *Demurrage—Charterparty—Lay Days—Arrival at Place of Loading.*] By charterparty it was agreed that the plaintiff's steamship should proceed to "Odessa or so near thereunto as she might safely get," and there load a cargo, "twelve running days" (Sundays excepted) "to be allowed for loading and discharging, and ten days on demurrage over and above the said lay-days."—The port of Odessa contained an outer and an inner harbour. The vessel arrived at a point in the outer harbour at which she was as near as she might safely get to a loading berth, and the master gave notice to the defendants' (the charterers) agents that she was ready to load. The cargo was stored at a quay in the inner harbour, and the agents were unwilling to load it elsewhere. The quays in the two harbours were the only places at which it was practicable to load, but there was no custom by which steamships under charterparty were not considered ready to receive cargo until after being moored alongside a quay. Owing to the crowded state of the port there was much delay before the vessel was able to take her place at the quay in the inner harbour where the cargo was stored, and she was not loaded till more than twelve days had elapsed from the time of her arrival in the outer harbour:—*Held*, that the lay-days were to be computed from the time of the arrival of the vessel in the outer harbour, and that the defendants were liable for demurrage. PYMAN BROTHERS *v.* DREYFUS BROTHERS & CO. [152

SIGNATURE—Particulars—County Courts—Costs - - - - 60, 533
See COUNTY COURT. 2, 3.

SOLICITOR—*Duties—Dealings with Client—Purchase of subject-matter of Suit—Practice—Garnishee Order—Equitable Charge—Priority—Order* XLV., *r.* 1.] The plaintiff, a solicitor, was the assignee of the amount of a verdict recovered in the Mayor's Court, London, and the deed of assignment contained a covenant for further assurance of the amount of the verdict or other the sum or sums of money which might become payable in the action to the assignor. A new trial was obtained, and the present plaintiff became the solicitor in that action, which terminated in a verdict for the plaintiff for the same amount as before. The present defendant, who was a judgment creditor of the plaintiff in the action in the Mayor's Court, obtained a garnishee order attaching the amount recovered in that action. In an interpleader to determine whether the plaintiff as assignee or the defendant as garnishee was entitled to the fruits of the judgment:—*Held*, that the rule that a solicitor conducting an action cannot purchase the subject-matter of the suit did not apply as the assignment preceded the employment as solicitor.—*Simpson* v. *Lamb* (7 E. & B. 84) approved and distinguished.—*Held*, also, that whether the assignment of the first verdict covered the amount of the second verdict or not, the intention of the assignment and covenant was to secure to the plaintiff the fruits of the litigation; that the plaintiff in that action could not deal with the amount recovered without violating the rights of his assignee; and that, therefore, the assignment took priority over the garnishee order. DAVIS *v.* FREETHY C. A. 519

—— Bankruptcy—Trustee—Remuneration 68
See BANKRUPTCY. 12.

—— Charges of solicitor retained to effect arrangement with creditors—Money received after notice of act of bankruptcy.
See BANKRUPTCY. [728

—— Privilege—Interrogatories to town clerk of corporation - - - - 695
See PRACTICE. 10.

—— Property recovered or preserved—Money in court—Charging order - - 627
See PRACTICE. 24.

STAMP—Revenue—Settlement—Contingent interest—Stock vested in trustees - 584
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TRADE MARK—*continued.*
was given that the powder was of German manufacture:—*Held*, that the respondents were guilty of the offence of applying a false trade description to goods within the meaning of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, sub-s. 1 (*d*), and that they had acted with intent to defraud within the meaning of s. 2, sub-s. 1 (*f*), and were liable to be convicted. STAREY *v.* CHILWORTH GUNPOWDER COMPANY 90

2. —— *Trade Name—Merchandise Marks Act*, 1887 (50 *&* 51 *Vict. c.* 28), *s.* 2, *sub-ss.* (1), (2), *s.* 3, *sub-ss.* (1), (3)—*Offence of selling Goods to which a false Trade Description is applied—Mineral Water in Bottles bearing Name of Person not the Manufacturer — Intent to defraud Purchaser.*] The appellant and respondent being rival manufacturers of mineral waters, the respondent, without the authority of the appellant, filled with mineral water of his own manufacture certain bottles, the property of and moulded with the name of the appellant, with the intention of selling such mineral water to his (the respondent's) customers.—The respondent, being found in possession of certain of such bottles so filled, was summoned under ss. 2, 3, of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), for having in his possession for sale goods to which a false trade description, namely, the false name of the appellant, was applied.—The magistrate found that the respondent had no intent to defraud the purchasers of the water, and that he must, therefore, be taken to have "acted innocently" within the meaning of s. 2, sub-s. (2), and on these grounds dismissed the summons:—*Held*, that the magistrate was wrong, for that an intent to defraud the purchasers was not a necessary ingredient of the offence charged. WOOD *v.* BURGESS [162

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